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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GHAITH R. PHARAON,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a $37 million civil monetary penalty against an individual for omissions under the Bank Holding Company Act is grossly disproportionate in violation of the Excessive Fines Clause.

2. Whether a $37 million civil monetary penalty against an individual under the Bank Holding Company Act that is within the maximum amount permitted by statute but grossly disproportionate to any penalty assessed in a comparable case violates the Due Process Clause.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ghaith R. Pharaon respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 10, 1998, and amended by Order entered April 17, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported, as amended, at 135 F.3d 148. The unamended version of that opinion as originally filed on February 10, 1998 is reprinted in the Appendix to this Petition at Pet. App. 1. The April 17, 1998 Order of the Court of Appeals amending its original opinion by deleting several passages is reprinted at Pet. App. 18. The final decision of the Board of Governors of the Federal Reserve System in this case is reprinted at Pet. App. 20. The Recommended Decision of the Administrative Law Judge on which the Board relied is reprinted at Pet. App. 56, and corrections thereto at Pet. App. 193 and 205. The Order of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing is reprinted in the Appendix to this Petition at Pet. App. 209; that court's Order denying the suggestion for rehearing *en banc* is reprinted at Pet. App. 210.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit in this case was entered on February 10, 1998. A petition for rehearing and suggestion for rehearing *en banc* was timely filed on March 27, 1998, and denied by Order entered April 17, 1998. The opinion filed February 10, 1998 was amended by Order entered April

17, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides, in relevant part, that "No person shall be . . . deprived of life, liberty, or property without due process of law."

The United States Constitution, Amendment VIII, provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

This case arises from a decision of the Board of Governors of the Federal Reserve System (the "Board") to impose upon petitioner Ghaith R. Pharaon a civil monetary penalty of $37 million for violations of the Bank Holding Company Act ("BHCA") and associated regulatory reporting requirements -- a sum vastly disproportionate to civil monetary penalties assessed by the Board in comparable cases. While Pharaon does not concede the correctness of the underlying finding of liability, he here seeks this Court's review solely as to the consistency of this penalty with the Eighth Amendment's ban on excessive fines and the Fifth Amendment's guarantee of due process.

In a Notice of Assessment of Civil Money Penalty filed September 13, 1991, the Board charged Pharaon with two kinds of violations of the banking laws. First, it charged that Pharaon, a prominent Saudi Arabian businessman, had participated in the acquisition of a small California bank by the London-based Bank of Credit and Commerce

International ("BCCI") without the prior approval of the Board as required of any company that becomes a bank holding company under Section 3(a) of the BHCA, 12 U.S.C. § 1842(a)(1). Pharaon had acquired the Independence Bank in his own name for $23 million in October 1985. The Board charged that he did so as an undisclosed nominee for BCCI, which had backed the loans with which Pharaon made the purchase, and had entered into an "acquisition agreement" with Pharaon which the Board characterized as giving BCCI a beneficial interest in 85% of Independence shares. The Board charged further that BCCI thereafter effectively controlled Independence through investment of capital and control of the selection of a majority of the bank's directors.

The Board charged, second, that Pharaon had participated in BCCI's failure to disclose its effective control of Independence in annual reports it had filed with the Board as required by the BHCA and the Board's regulation Y. *See* 12 U.S.C. § 1844(c); 12 C.F.R. §§ 225.2(c)(2) & 225.5(b). Even if Pharaon had no actual knowledge of the contents of BCCI's reports, according to the Board, he could be charged with participating in BCCI's reporting omissions under the broad language of 12 U.S.C. § 1847(b)(5), which defines a violation of the BHCA to include "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling or aiding or abetting a violation."

Without any explanation of how such a figure had been derived, the Board's Notice demanded of Pharaon a civil monetary penalty of $37 million, and sought to prohibit Pharaon from future participation in the banking industry. The Board's enforcement counsel sought to proceed summarily against Pharaon, who had remained outside the United States but denied all charges through his counsel. While the administrative law judge ("ALJ") was prepared to

proceed summarily against Pharaon, Pharaon appealed and the Board, reversing the ALJ, ordered that the matter receive a plenary hearing. After a one-month hearing conducted in 1995, the ALJ issued a recommended decision sustaining all the allegations in the Notice, assessing the $37 million civil monetary penalty that had been requested in the Notice, and issuing an order of prohibition against Pharaon. *See* Pet. App. 56-192.

In arriving at the decision to recommend the $37 million monetary penalty, the ALJ began by calculating the maximum amount that might be assessed under the governing statutes. Prior to the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), a violation of the BHCA or its implementing regulations was subject to a maximum civil penalty of $1000 for each day the violation continued; after August 10, 1989, the effective date of FIRREA, the maximum daily penalty increased to $25,000 for each day the violation continues. *See* 12 U.S.C. § 1847(b)(1). The ALJ noted that, if each day between Pharaon's acquisition of Independence and issuance of the Notice of Assessment were counted as a separate violation of the Act, and if such liability were cumulative for each separate year that BCCI filed a Y-7 report without reference to Independence, then the statutory maximum liability would total $111.6 million. *See* Pet. App. 161-164.

The ALJ next made reference to the "mitigating factors" required under 12 U.S.C. § 1818(i)(2)(G) to be considered in determining any penalty: "(i) the size of financial resources and good faith of the . . . person charged; (ii) the gravity of the violation; (iii) the history of previous violations; and (iv) such other matters as justice may require." The ALJ asserted that Pharaon must be "an extremely wealthy individual," having declared his net worth

over a decade earlier to be "almost half-a-billion dollars." Pet. App. 168. The ALJ argued further that Pharaon had not shown good faith, had committed grave banking violations, and had made other reporting omissions in connection with the Independence purchase, concluding that no mitigation was in order. Pet. App. 169-176.

Finally, in setting the recommended penalty amount, the ALJ noted, but then expressly declined to rely on, the thirteen mitigating and aggravating factors set forth in the Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423, 59,424-45 (1980) (the so-called "FFIEC" factors). *See* Pet. App. 177-184 (listing the factors as "willfulness," "frequency or recurrence," "continuation of violation," "failure to cooperate," "concealment," "harm to the institution or public confidence," "gain or benefit," "restitution," "prior violations," "previous criticism," "compliance program," "unsafe or unsound practices," and "preventive measures"). The ALJ suggested that he had privately undertaken an application of these factors, "the details of which are not repeated since they resulted in computation of a civil money penalty of slightly over $300 million," Pet. App. 184, an amount he deemed irrelevant since it exceeded the $111 million statutory maximum. In his corrections to the recommended decision filed three days later, the ALJ cut the supposed $300 million in half to $151 million without explanation, as if a change of such magnitude were merely a typographical error, *see* Pet. App. 194, 204.

Summing up his penalty recommendation, the ALJ conceded that, "insofar as the transactions with Independence are concerned, Pharaon did not enjoy any material financial or other benefit." Pet. App. 184. Nonetheless, he concluded, as a matter of what he called "judgmental

rationality," that the penalty against Pharaon should "be limited to less than the maximum of $111 million, but should be not less than one-third thereof, to wit, $37 million, the amount sought in the original Notice." Pet. App. 184. He noted that "collection of this sum is clearly within Pharaon's means" because it was "presumably secured by the predecisional attachment" of Pharaon's assets within the United States. Pet. App. 184; *see id.* at 131 (stating "There has been a predispositional seizure of some $37 million in assets within the United States said to belong to Pharaon").

The Board issued a final decision on January 31, 1997, rejecting all of Pharaon's and the government's exceptions to the ALJ's recommended decision. Concurring in the findings of the ALJ, the Board imposed upon Pharaon both a monetary penalty of $37 million and an order of prohibition. Quoting the ALJ's recommended decision, the Board stated that "'[$37 million] is a very meaningful figure, in line with the gravity of the offenses, the intentional nature of the actions, [and] the attempts to conceal the nature of the transactions that also took into account both Pharaon's financial means and the failure to establish an evidentiary link between Pharaon and the Independence Bank transactions by themselves.'" Pet. App. 34. Like the ALJ, the Board conceded that there had been no showing of the amount of any gains Pharaon had sought or realized from the Independence acquisition, but found it sufficient that there had been some sort of "an overall plan" that had been intended to "yield profits in which Pharaon would share." Pet. App. 35-36.

Pursuant to 12 U.S.C. § 1818(h)(2), Pharaon appealed the Board's decision to the Court of Appeals for the District of Columbia Circuit, which affirmed in all material respects in a decision filed February 10, 1998. With respect to the $37 million monetary penalty, the court of appeals conceded

that "the Board nowhere tells us how its enforcement counsel originally selected thirty-seven million dollars." Pet. App. 14. The court nonetheless rejected Pharaon's argument that the penalty amount was arbitrary or capricious under the Administrative Procedure Act ("APA"), asserting that the "path" of the Board's reasoning could "'reasonably be discerned'" as follows:

> Thirty-seven million dollars reflects the approximate amount the Board found BCCI invested in Independence, as well as approximating the magnitude of the gains sought and the potential harm posed by Pharaon's facilitation of BCCI's secret takeover of a bank worth several hundred million dollars.

Pet. App. 14-15. The court later again referred to "BCCI's unrecoverable investment in the now-defunct Independence" in sustaining the prohibition order against Pharaon. Pet. App. 17. The court asserted this justification for the amount of the penalty despite the fact that the only evidence in the record of the "worth" of Independence was its purchase price of $23 million, not "several hundred million dollars"; despite the fact that there was no evidence in the record of the amount of any "gains" expected by Pharaon from the undisclosed Independence acquisition; and despite the fact that there was no evidence in the record that BCCI had lost money on Independence since there was nothing in the record to suggest that BCCI's loans to Pharaon had not been repaid.

The court of appeals went on to summarily reject Pharaon's arguments that the penalty violated the Excessive Fines Clause of the Eighth Amendment, U.S. Const. Amend. VIII, and the Due Process Clause of the Fifth Amendment, U.S. Const. Amend. V, as interpreted in *BMW of North*

America v. Gore, 517 U.S. 559 (1996). With respect to the excessive fines claim, the court stated that "[a]s we have already indicated in rejecting Pharaon's APA challenge, the penalty is proportional to his violation and well below the statutory maximum." Pet. App. 16. With respect to the due process claim, the court stated simply that "[b]ecause the assessed penalty falls far below the statutory maximum, Pharaon cannot claim that he lacked constitutionally adequate notice." Pet. App. 16.

On March 29, 1998, Pharaon filed a petition for rehearing and suggestion for rehearing *en banc*, arguing, *inter alia*, that the court of appeals' post hoc rationalization for the selection of $37 million as the amount of the penalty lacked any basis in the record. On April 17, 1998, the court of appeals issued orders denying Pharaon's petition for rehearing and suggestion for rehearing *en banc*. *See* Pet. App. 209, 210.

The court of appeals, however, also issued a third order on April 17, 1998, setting forth two remarkable amendments to its original opinion. It ordered the deletion in its entirety of the sentence quoted above, which states "Thirty seven million dollars reflects the approximate amount . . .," and likewise ordered the deletion of the sentence later referring to "BCCI's unrecoverable investment" in Independence. *See* Pet. App. 18-19. In other words, the court of appeals deleted the only sentences in its earlier opinion offering any reasoned basis for the appropriateness of the $37 million penalty amount. Stripped of these sentences, the opinion as amended no longer affords any basis whatever for finding the assessed penalty "proportional to [Pharaon's] violation." Accordingly, the panel's finding that the penalty is constitutional under the Excessive Fines and Due Process Clauses is left to rest solely on the premise that the penalty is below the statutory maximum.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Board's assessment of a $37 million civil monetary penalty against petitioner Pharaon is the paradigm case of an "extreme result that jar[s] one's constitutional sensibilities." *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). A sum of this order of magnitude is unparalleled in Board enforcement history in comparable cases before or since. As set forth in the record below, the highest civil money penalty assessed by the Board during the period 1990-1994 against any individual for banking violations unconnected to BCCI was $600,000, and the average penalty assessed against any individual during that period was $60,000. *See* Pet. App. 211-215. Thus, the Board singled out Pharaon for a penalty nearly 62 times the next highest amount levied on any like individual and more than 600 times the average individual penalty for that time period.

When the Board's enforcement practice is updated to the present, it is clear that the Pharaon penalty remains an extreme outlier, greater by many orders of magnitude than individual penalties in other similar cases. After 1994, the highest civil money penalty assessed against an individual for banking violations was $717,941, a sum less than one-fiftieth the amount assessed against Pharaon, even in a case involving deliberate and egregious violations of the banking laws. *See* Pet. App. 216; *see also Long v. Board of Governors*, 117 F.3d 1145 (10th Cir. 1997) (affirming the $717,941 penalty). And the average penalty assessed against individuals during this period was just over $44,000, again a trivial fraction of the amount assessed against Pharaon.

To be sure, under an apparent BCCI exception to normal Board practices, three other individuals charged with

BCCI-related banking violations were assessed multimillion-dollar penalties during the 1990-1994 time period. *See* Pet. App. 211 (noting a $35 million penalty assessed in 1993 against Sheikh Khalid bin Mahfouz, a $20 million penalty assessed in 1992 against Kemal Shoaib, and a $10 million penalty assessed in 1992 against Sheikh Kamal Adham). But those penalties are not properly viewed as parallel to the one assessed against Pharaon. In the cases of Sheikh Mahfouz and Sheikh Adham, two other very prominent Saudi Arabian businessmen, these payments were made in connection with the complete settlement of extensive criminal charges filed by the New York District Attorney. And in the case of Shoaib, the assessment was entered on default. Pharaon's assessment, in contrast, is vigorously contested and relates solely to civil banking violations. In any event, even if these cases were viewed as comparable to Pharaon's, they would hardly dispel the issue of whether Pharaon's treatment, as well as theirs, was disproportionate in relation to general Board practice.

Despite the stark and vivid disproportion between the penalty imposed on Pharaon and penalties imposed by the Board in like cases, the decision of the court of appeals as amended treated the Excessive Fines Clause and the Due Process Clause as satisfied virtually *per se* by the fact that $37 million was within the amount authorized by statute -- notwithstanding the absence of any reasonable explanation for how such a figure had been chosen from among all the numbers between zero and $111 million. This decision cannot be squared with this Court's recent holding in *United States v. Bajakajian*, 66 U.S.L.W. 4514 (U.S. June 22, 1998), that grossly disproportionate monetary sanctions violate the Excessive Fines Clause of the Eighth Amendment. Nor can it be squared with this Court's holding in *BMW of North America v. Gore*, 517 U.S. 559 (1996), that the Due Process Clause of the Fifth Amendment invalidates monetary

sanctions whose ratio to actual harm or to sanctions imposed in comparable cases is so "breathtaking" as to suggest the exercise of arbitrariness, caprice, or redistributive opportunism. For either or both of these reasons, this Court should grant the petition and give this case plenary review.

This Court should review the judgment below not only because it subjects Pharaon to grave constitutional error warranting correction in this particular case, *cf. BMW*, 517 U.S. at 586 n.41 (stating that "the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit . . . surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one"), but also because it invites recurring constitutional error under the BHCA and numerous similar laws. For the BHCA, like many other federal statutes, permits modest penalties to be multiplied, potentially to the point of abuse, by a factor bearing little relationship to the gravity of the underlying conduct -- here, the number of days a reporting violation continues. *Cf.*, *e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2615(a) (authorizing a penalty of up to $25,000 per day for noncompliance or reporting omissions under environmental laws); High Seas Fishing Compliance Act, 16 U.S.C. § 5507(a) (authorizing a penalty of up to $100,000 per day for noncompliance or reporting omissions under fishing laws); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9609(b) (authorizing a penalty of up to $25,000 per day for noncompliance or reporting omissions under hazardous waste disposal laws); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11045(b)(2) (authorizing a penalty of up to $25,000 per day, or $75,000 per day in the case of a subsequent offense, for violation of reporting requirements relating to releases of hazardous substances). Under such statutes, the maximum authorized penalty amount

quickly escalates to astronomical sums. A rule that any monetary penalty is *per se* constitutional if below a statutory maximum that may well approach infinity is tantamount to a rule that the Constitution does not apply to such penalties at all.

This Court therefore should grant *certiorari* to clarify the point that monetary penalties that are grossly disproportionate to sanctions in like cases and to any specifically demonstrated harm do not automatically satisfy the Fifth and Eighth Amendments merely because they are within a statutory maximum -- especially where the statutory maximum is elastic and indefinite. Alternatively, this Court at the very minimum should grant the petition and vacate and remand the decision below for reconsideration in light of this Court's intervening decision in *United States v. Bajakajian*.

II. The Decision Below Violates The Excessive Fines Clause As Interpreted By This Court In *United States v. Bajakajian*

The sum total of the court of appeals' response to Pharaon's excessive fine claim in its original opinion was the following: "As we have already indicated in rejecting Pharaon's APA challenge, the penalty is proportional to his violation and well below the statutory maximum." Pet. App. 16. After the court's order of April 17, 1998 deleted the sole sentence in its original opinion stating how Pharaon's penalty might be sufficiently "proportional" to defeat his APA challenge, *see* p. 8 *supra*, the court's only remaining rationale for the constitutionality of the penalty under the Excessive Fines Clause was that $37 million was below the statutory maximum. But such a premise of *per se* constitutionality plainly conflicts with this Court's intervening decision in *United States v. Bajakajian*, 66 U.S.L.W. 4514 (U.S. June 22, 1998).

In *Bajakajian*, this Court for the first time held a monetary sanction unconstitutional under the Excessive Fines Clause. The Court had long noted that "[t]he Excessive Fines Clause limits the government's power to extract payments . . . 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). But *Bajakajian* clarified for the first time that the test for determining if a punitive civil sanction violates the Excessive Fines Clause is whether "it is grossly disproportional to the gravity of a defendant's offense." 66 U.S.L.W. at 4518.

Applying this test, *Bajakajian* held that a defendant could not constitutionally be forced to forfeit the entire sum of $357,144 in currency that he was trying to take out of the country without complying with currency reporting laws. Writing for the Court, Justice Thomas held that this forfeiture was punitive for purposes of the Excessive Fines Clause, *see id.* at 4516, and that a penalty in such an amount was grossly disproportional to the offense of "a willful failure to report the removal of currency from the United States". *Id.* at 4519. As Justice Thomas wrote, the forfeiture was larger "by many orders of magnitude" than the $5000 maximum fine authorized in the defendant's circumstances by the United States Sentencing Guidelines, and bore "no articulable correlation to any injury suffered by the Government." *Id.* Justice Thomas deemed it irrelevant that Congress and the Sentencing Commission had expressly authorized the forfeiture in addition to the fine, reasoning that a sentencing guideline permitting a forfeiture mandated by statute "cannot override the constitutional requirement of proportionality review." *Id.*

The Excessive Fines Clause plainly applies to civil monetary penalties under the BHCA just as it did to the *in*

personam forfeiture in *Bajakajian*. Just last Term, this Court specifically suggested that, even if civil money penalties assessed under the National Bank Act, 12 U.S.C. § 93, did not constitute an "offence" for purposes of the Double Jeopardy Clause, they were nonetheless subject to "[t]he Eighth Amendment['s] protect[ion] against excessive civil fines." *Hudson v. United States*, 118 S. Ct. 488, 495 (1997).

Moreover, even if civil monetary penalties must be specifically shown to be "punitive" in order to trigger the ban on excessive fines, there can be no doubt that penalties under the BHCA meet that standard. Like the *in personam* forfeiture in *Bajakajian*, BHCA penalties are imposed as punishment designed to deter and to achieve retribution, not as remedies to compensate the government for loss. When first enacted in 1978, civil monetary penalties under the banking statutes were intended to "serve as deterrents to violations of laws, rules, regulations, and orders of the [banking] agencies." H.R. Rep. No. 95-1383, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9289. When those penalties were increased by FIRREA in 1989, they were intended to strengthen federal enforcement power against banking "fraud or insider abuse," H.R. Rep. No. 101-54, pt. 1, at 294, 300 (1989), *reprinted in* 1989 U.S.C.C.A.N. 90, 96, and, in light of crippling backlogs in bank fraud investigations in the federal criminal justice system, *see id.* at 464-65, *reprinted in* 1989 U.S.C.C.A.N. 260-61, to "give[] the regulators . . . the tools which they need . . . to punish culpable individuals," *id.* at 466, *reprinted in* 1989 U.S.C.C.A.N. 262. The Board's own statements likewise routinely confirm that it understands civil monetary penalties as serving punitive rather than remedial functions. *See, e.g., In re Vic Sather & Associates, Inc.*, 79 Fed. Res. Bull. 160, 164 (1993) (noting that "an assessment of a penalty under the BHC Act serves the purposes of deterring repeat violations

by the Respondents (specific deterrence) and acting as a warning to other similar bank holding companies and individuals (general deterrence)").

Under the Excessive Fines Clause as interpreted in *Bajakajian*, the decision below cannot stand. Here, as in *Bajakajian*, the overwhelming bulk of the basis for the penalty amount -- the cumulative daily penalties from the omission of mention of Independence in BCCI's Y-7 reports -- stems from what was "solely a reporting offense." 66 U.S.L.W. at 4519. Here, as in *Bajakajian*, the government was deprived "only of the information" about the ownership of Independence, not of any demonstrated "loss to the public fisc." *Id.* Here, as in *Bajakajian*, the penalty amount was wildly disproportional to the culpability level the government had otherwise given notice it attached to the misconduct -- there, through the $5000 fine provided for in the Sentencing Guidelines, *id.*, and here, through the settled practice of assessing penalty amounts no greater than $600,000 to $700,000 in comparable cases. And here, as in *Bajakajian*, it is no defense that Congress has expressly authorized the penalty, for here, as in *Bajakajian*, such statutory authorization "cannot override the constitutional requirement of proportionality review." *Id.* n.14.

The proportionality review that is constitutionally required under *Bajakajian* remains to be undertaken in this case. The Board expressly declined to rely on "proportionality tests that . . . compare the size of the penalty with the size of any actual damages or government loss," choosing instead to examine merely the "'nature of the conduct.'" Pet. App. 43. Upon reaching the conclusory judgment that Pharaon's conduct was "fully intentional, continuing and extremely serious," the Board made no further inquiry into whether the unprecedented $37 million penalty against him might constitute an excessive fine. The

test applied by the Board is obviously incorrect as a matter of law after *Bajakajian*. And whatever proportionality review the court of appeals undertook in its original opinion was utterly wiped out by its order amending its decision. The court's apparent residual conclusion that a fine is *per se* constitutional if authorized by Congress is plainly contradicted by *Bajakajian*. *Bajakajian* held that statutory authorization does not automatically defeat an excessive fines claim and required appellate courts to review excessive fines claims *de novo* for proportionality based on all relevant facts. 66 U.S.L.W. at 4519 n.10. As amended, the court of appeals' opinion entirely abdicated this constitutional duty.

For these reasons, this Court should grant the petition and apply the appropriate proportionality review to the extraordinary penalty levied against Pharaon in this case. Alternatively, this Court at least should grant, vacate and remand the decision to the court of appeals for reconsideration in light of *Bajakajian*.

III. The Decision Below Violates The Due Process Clause As Interpreted By This Court In *BMW of North America v. Gore*

The court of appeals summarily rejected Pharaon's due process objections to the $37 million penalty with the simple pronouncement that "[b]ecause the assessed penalty falls far below the statutory maximum, Pharaon cannot claim that he lacked constitutionally adequate notice." Pet. App. 16. With all respect, such a mechanical approach to due process is inconsistent with this Court's precedents and accordingly merits this Court's review.

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), this Court invalidated as grossly excessive a jury award of punitive damages against a tortfeasor, holding that

the guarantee of due process imposes outer limits on disproportionate or arbitrary monetary penalties. As Justice Stevens wrote for the majority: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that [government] may impose." *Id.* at 574. As the Court made clear in *BMW*, a punitive damages award of $2 million for a $4000 concealed paint job -- involving as it did a "breathtaking 500 to 1" ratio between penalty and actual harm, *id.* at 583 -- did not afford such fair notice and thus was unconstitutional.

The Court in *BMW* expressed two related but distinct concerns about such excessive punitive damage awards. First, the Court noted that such awards offend notions of proportionality with deep roots in the common law. *See id.* at 580 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 476-79 & nn.1-3 (1993) (O'Connor, J., dissenting). This concern is a substantive one that looks to whether the amount of the penalty is excessive in relation to the harm caused -- a consideration similar to the one the Court expressed in interpreting the Excessive Fines Clause of the Eighth Amendment in *Bajakajian*.

Second, quite apart from any substantive concern with proportionality, the Court in *BMW* viewed excessive punitive damages awards as likely to reflect procedures that are inconsistent with the rule of law. As Justice Stevens emphasized in the majority opinion, due process requires that a penalty be foreseeable in amount. A punitive damages award that departs sharply from settled practice in comparable cases cannot afford such predictability. Moreover, an unforeseeable penalty raises the dangers of

arbitrary and selective treatment. As Justice Breyer, joined by Justices O'Connor and Souter, wrote in concurrence in *BMW*: "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." 517 U.S. at 587 (Breyer, J., concurring). *See also TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 472-73 (O'Connor, J., dissenting) (noting that the Due Process Clause requires limits on the role of arbitrary or irrelevant factors in jury discretion).

For either or both of these reasons, the $37 million penalty that the Board assessed against Pharaon, like the punitive damages award invalidated in *BMW*, is excessive, in violation of due process. Whether measured by "the disparity between the harm or potential harm" demonstrated and the amount of the penalty, *see BMW*, 517 U.S. at 575, or by "the difference between this remedy and the civil penalties . . . imposed in comparable cases", *see id.*, a $37 million penalty for BHCA omissions is wildly disproportionate. And neither the Board nor the court below has offered any articulable basis for the disparity.

To begin with, the staggering difference between the Board's treatment of Pharaon and its treatment of his counterparts in non-BCCI cases cannot be explained by different degrees of reprehensibility in their underlying conduct. *See id.* (listing "reprehensibility" as a relevant guidepost). For the BHCA penalty provisions contain no requirement of scienter, and, while the ALJ and the Board made conclusory findings that Pharaon had been conscious of wrongdoing, other individuals found by the Board to have

engaged in intentional and even flagrant misconduct have received penalties a fraction as large.

For example, in *Interamericas Investments, Ltd. v. Board of Governors*, 111 F.3d 376 (5th Cir. 1997), a case involving deliberate and egregious reporting omissions by a foreign bank holding company, the Board assessed penalties of only $1 million against the company and $10,000 against the individual. The Board has never explained why Pharaon's reporting omissions should be penalized in an amount 370 times as high. Nor can any difference in "reprehensibility" explain why Pharaon was penalized 52 times as heavily as the individual in *Long v. Board of Governors*, 117 F.3d 1145, 1156 (10th Cir. 1997) (affirming a $717,941 BHCA penalty for engaging deliberately in an unapproved bank merger and refusing to reverse the transaction despite repeated warnings from banking officials, finding "$567,941 [to be] necessary to deprive [the defendant] of the fruits of his unlawful conduct," and "a $150,000 penalty [to be] essential to deter future misconduct").

Nor can the explanation be found in any greater degree of harm caused by Pharaon's actions. For as the court of appeals' telling amendment of its opinion confirms, there is not, and has never been in this case, any demonstration of any dollar figure for any harm supposedly caused by the omissions charged against Pharaon, whether $37 million or any other amount. Nor did the government demonstrate any amount of unjust enrichment to Pharaon that might have justified disgorgement or restitution, a fact that both the ALJ and the Board expressly noted.

Nor can Pharaon's personal wealth, which the Board presumed to be considerable based on a then decade-old admission, supply the reason for the vastly different penalty

imposed upon him. As this Court noted in *BMW*, the fact that one is wealthy rather than "impecunious" does not diminish one's "entitlement to fair notice." 517 U.S. at 585. And as Justice Breyer cautioned in his concurrence, wealth ought not be used as "an open-ended basis for inflating awards." *Id.* at 591 (Breyer, J., concurring). *See also TXO*, 509 U.S. at 487-95 (O'Connor, J., dissenting) (noting the danger that an emphasis on a defendant's financial resources may tempt juries to engage improperly in the arbitrary redistribution of wealth). In any event, the governing statute permits "the size of financial resources" to be used only as a mitigating factor, not as a starting point for setting a penalty grossly disproportionate to any assessed in a comparable case.

Surely the fortuity that the government had attached $37 million of Pharaon's assets prior to this proceeding, *see* Pet. App. 131, 184, cannot suffice to justify a penalty in precisely that amount. Due process requires far more than a rule of finders-keepers. *Cf. Bajakajian*, 66 U.S.L.W. at 4519 (finding "no inherent proportionality" in the government's keeping precisely the amount of the defendant's currency it had in hand).

Concerns to effect deterrence likewise cannot explain the disproportionate penalty imposed upon Pharaon. Specific deterrence of future misconduct by Pharaon himself is hardly a relevant consideration in an action prohibiting him from future participation in the United States banking industry. And there is no reason why general deterrence of reporting violations under the banking law could not be achieved by setting the penalty at an amount sufficient to discourage the person of less than extraordinary wealth. *Cf. Long*, 117 F.3d at 1156 (finding a mere $150,000 penalty component sufficient "to deter future misconduct"). As Justice Stevens noted in *BMW*, "[t]he sanction imposed in this case cannot be

justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584.

Thus the one and only source of supposed constraint on the unfettered and unguided exercise of Board discretion in this case is the fact that $37 million was within the maximum authorized by the governing statute, read to permit successive and cumulative daily penalties for the same misconduct over a period of years. As amended, the court of appeals' decision below must be read to set forth a *per se* rule that any penalty under the BHCA is consistent with due process if below the statutory maximum, no matter how dramatically that penalty departs from amounts assessed in parallel matters under settled administrative practice. But such a *per se* rule cannot be reconciled with due process as interpreted in *BMW*.

To be sure, the Court in *BMW* acknowledged the relevance of legislative judgments of the appropriate level of civil sanctions, finding that the punitive damage award at issue there was lawless in part because it exceeded the maximum civil penalties authorized by the state legislature for comparable conduct. And to be sure, the $25,000 per day penalties authorized under the BHCA as amended by FIRREA reflect Congress's judgment that maintaining the integrity of the banking system is extraordinarily important.

But the statute at issue here is a far cry from the sort of statute referred to as a source of due process guidance in *BMW*. Unlike a statute setting forth a fixed ceiling for a penalty amount, such as a maximum dollar figure or a maximum percentage of net worth, the BHCA sets forth only a daily maximum that may be cumulated indefinitely. Such a sanction, when applied to reporting violations that endure over several years, rapidly escalates to astronomical sums far

beyond any specific contemplation attributable to Congress. If Congress had authorized civil sanctions without limit, it would hardly be consistent with due process for an agency to assess penalties in the amount of infinity. A statute allowing the indefinite cumulation of penalties likewise cannot foreclose inquiry into whether any given penalty falling within its wide range is consistent with due process.

Put another way, a statutory penalty scheme allowing penalties that rapidly cumulate to astronomical sums should be understood as delegating to the implementing agency the constitutional responsibility of articulating standards that will allow consistent and non-arbitrary treatment of offenders within the monetary ranges that are practically realistic. On this score, the Board's performance in this case was severely wanting. While the Board is bound to consider the thirteen FFIEC factors in penalty determinations, as the court of appeals held, *see* Pet. App. 14, the ALJ's private "computation" of the appropriate penalty amount under those factors was so unsystematic that it apparently yielded a sum of $300 million one day and $151 million the next. "Factors" that do so little to constrain open-ended discretion are not enough to satisfy due process. *Cf. BMW,* 517 U.S. at 589-92 (Breyer, J., concurring) (finding a seven-factor test set forth by the Alabama Supreme Court too vague and open-ended to cabin the jury's discretion as required by due process).

In short, the Board in this case chose the penalty amount with free-floating discretion, and not subject to any genuinely constraining rule of law. Without some articulable connection to a theory of retribution, deterrence, or restitution, the Board's sharp deviation from historical practice in singling out Pharaon for an astronomical sanction amounts to the very sort of arbitrary behavior condemned in *BMW* -- not the exercise of law, but of "a decisionmaker's

caprice". *Id.* at 587. Without any reasoned theory of how $37 million is proportional to some harm done to Independence, BCCI or the United States banking system, that sum is for all intents and purposes chosen at random.

The application of due process to civil monetary penalties is an important issue not only for those subject to the multiple daily penalties of the BHCA as amended by FIRREA, but for all those subject to any similar multiple or cumulative penalty scheme authorized by federal statute. *See* pp. 11-12 *supra*. The court of appeals' *per se* rule immunizing from due process review any penalty amount below the statutory maximum in such a scheme cannot be reconciled with due process or the rule of law. Because of the grave constitutional injustice to Pharaon in this case, the stark conflict between the decision below and this Court's decision in *BMW*, and the potential importance of the erroneous ruling below across a wide range of statutes involving highly elastic penalty structures, this Court should grant review in this case.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition and give plenary review to the decision below. In the alternative, Petitioner respectfully requests that this Court grant the petition, vacate the decision below, and remand to the court of appeals for reconsideration in light of this Court's intervening decision in *United States v. Bajakajian*.

Dated: Stanford, California
July 14, 1998

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 8, 1997 Decided February 10, 1998

No. 97-1114

GHAITH R. PHARAON,

PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

RESPONDENT

On Petition for Review of an Order of the Federal Reserve System

---

Richard F. Lawler argued the cause for petitioner. With him on the briefs were *Philip M. Smith* and *John C. Canoni*.

Stephen H. Meyer, Senior Attorney, Board of Governors of the Federal Reserve System, argued the cause for respondent. With him on the brief were *James V. Mattingly, Jr.*, General Counsel, *Richard M. Ashton*, Associate General Counsel, and *Katherine H. Wheatley*, Assistant General Counsel. *Douglas B. Jordan*, Senior Counsel, entered an appearance.

Before: GINSBURG, HENDERSON and TATEL, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Petitioner challenges the Board of Governors' conclusion that he participated in violations of the Bank Holding Company Act by the Bank of Credit and Commerce International. He also challenges the Board's decision to fine him thirty-seven million dollars and bar him permanently from the U.S. banking industry. Because substantial evidence supports the Board's findings of fact and because petitioner's challenges to the Board's procedures, conclusions of law, and choice of sanctions lack merit, we affirm.

I

Section 3(a) of the Bank Holding Company Act makes it unlawful for a company to become a bank holding company without approval of the Board of Governors of the Federal Reserve System. 12 U.S.C. § 1842(a)(1) (1994). In a September 1991 Notice of Assessment, the Board charged petitioner Ghaith R. Pharaon, a prominent Saudi Arabian businessman and major shareholder in the Bank of Credit and Commerce International ("BCCI"), with participating in a scheme through which BCCI, using Pharaon as an undisclosed "nominee" or front, secretly acquired control of Independence Bank, a medium-sized California lender, in

violation of section 3(a) of the Act. According to the Board, the scheme was intended to solve two problems BCCI faced in the mid-1980's: accumulated losses of over a billion dollars and pressure from Luxembourg, BCCI's nominal home country, to find a new country capable of regulating an institution operating in nearly seventy nations. Ownership of Independence would solve the first problem by generating profits for BCCI and the second by laying the groundwork for transferring BCCI's oversight to U.S. banking agencies. Pharaon's participation in the scheme, the Board asserted, allowed BCCI to mask its control of Independence from federal regulators, preventing them from obtaining an accurate view of Independence's true management and resources. The Board charged that from 1985, when BCCI secretly purchased Independence, until 1991, when bank regulators from several countries seized BCCI, BCCI controlled Independence, infusing capital into the bank, approving selection of its directors, and actively participating in its management.

In addition to charging Pharaon with participating in BCCI's section 3(a) violation, the Notice of Assessment charged that during the period BCCI secretly controlled Independence the annual reports (known as Y-7s) that BCCI was required to submit to the Board as a foreign bank with U.S. branches, *see id* § 3106(a), concealed its control of the bank in violation of section 5(c) of the Act, *id.* § 1844(c), and its implementing regulation, Regulation Y, 12 C.F.R. § 225.5 (1997). The Notice held Pharaon responsible for BCCI's violations under the Act's individual liability provision, section 8(b), 12 U.S.C. § 1847(b), and proposed a thirty-seven million dollar civil penalty. Considering Pharaon "institutional[ly]-affiliated" with BCCI under 12 U.S.C. § 1813(u), the Notice also sought an order of prohibition pursuant to section 8(e) of the Federal Deposit Insurance Act, *id.* § 1818(e)(1), permanently barring him

from participating in the affairs of any federally insured depository.

Shortly after the Board issued its Notice, a federal grand jury sitting in Washington, D.C., indicted Pharaon for criminal offenses relating to BCCI's purchase of Independence. The following year, another federal grand jury, this one sitting in Miami, Florida, and a state grand jury in New York, each indicted Pharaon in connection with his larger involvement with BCCI. Bench warrants for Pharaon's arrest were issued in connection with the Washington and Miami indictments. Pharaon responded to neither.

In the meantime, from his home in Saudi Arabia and acting through U.S. counsel, Pharaon answered the Board's Notice of Assessment, denying all charges and requesting a hearing. Citing Pharaon's decision to remain beyond the reach of federal prosecutors and relying on fugitive disentitlement, a doctrine allowing courts to sanction parties where their fugitive status has "some connection" to the proceeding, *Daccarett-Ghia v. Commissioner*, 70 F.3d 621, 624 (D.C. Cir. 1995), the Administrative Law Judge recommended ruling summarily for the Board. In a 1994 decision, the Board declined to adopt the ALJ's recommendation, rejecting the use of fugitive disentitlement because Pharaon's physical presence was unnecessary to a hearing, because the Board had no responsibility to vindicate any affront to the courts that had indicted Pharaon, and because any judgment against Pharaon could be satisfied from his frozen assets. The Board made clear, however, that on remand the ALJ could use his "express and implicit procedural powers" to ensure that Pharaon's fugitive status not disrupt the proceedings.

Following a nineteen-day hearing, the ALJ issued a recommended decision finding in favor of the Board and approving the penalties sought in the Notice of Assessment.

Filing 179 pages of exceptions challenging virtually all of the ALJ's findings of fact and conclusions of law, Pharaon appealed to the Board. Board enforcement counsel also appealed, arguing that the ALJ should have imposed the maximum statutory penalty of $111.5 million (calculated by totaling the days each violation had been outstanding at the time the Board issued the Notice—8299 days—and assessing a penalty of $1000 for each day prior to August 10, 1989, when Congress amended the Act to increase its penalties, and $25,000 per day thereafter, *see* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 907(j)(2), 103 Stat. 183, 475 (1989) ("FIRREA") (codified at 12 U.S.C. § 1847(b)(1))). The Board adopted the ALJ's recommended decision.

Pharaon now petitions for review. Applying the standards set forth in the Administrative Procedure Act, *see* 12 U.S.C. §§ 1818(h), 1847(b)(3) (APA applies to penalty assessment hearings under the Bank Holding Company Act), we will set aside the Board's factual findings only if unsupported by substantial evidence on the record as a whole, 5 U.S.C. § 706(2)(E) (1994); we will set aside the Board's legal conclusions only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

II

We begin with Pharaon's challenges to the Board's finding that BCCI violated the Bank Holding Company Act. The Act makes it "unlawful, except with the prior approval of the Board . . . for any action to be taken that causes any company to become a bank holding company." 12 U.S.C. § 1842(a). A company becomes a bank holding company if, among other things, "(A) the company directly or indirectly . . . owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or

company; [or] (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company." *Id.* § 1841(a)(2)(A)-(B). The Act provides for bank holding companies to file periodic reports with the Board to facilitate Board oversight. *Id.* § 1844(c); 12 C.F.R. § 225.5. Finding that BCCI controlled more than twenty-five percent of Independence's voting stock, as well as the election of a majority of its directors, the Board concluded that BCCI had become a holding company within the meaning of both subsections (A) and (B) and that it concealed its unlawful control by filing Y-7s that flatly denied controlling any U.S. banks.

For its subsection (A) finding, the Board relied primarily on a May 17, 1985, agreement between Pharaon and the International Credit and Investment Company (Overseas) Ltd. ("ICIC"), a BCCI-controlled company. Titled "Acquisition of Shares of Independence Bank," and signed by Pharaon and Swaleh Naqvi, BCCI's then-second-in-command, the agreement provides in relevant part as follows:

1. [Pharaon and ICIC] have agreed to acquire 100% of shares capital of the Bank (the said shares) from the present shareholders thereof. . . .

2. All the said shares of the Bank on their purchase as aforesaid shall be transferred to and held in the name of [Pharaon] but only 15% of the said shares of the Bank will be held by [Pharaon] as beneficial owner thereof.

3. For the balance of 85% of the said shares of the Bank, ICIC shall have the right to purchase them at their cost price from [Pharaon] either in its own name or in the name or names of its nominee or nominees and, till [sic] such purchase is effected and the shares transferred to the name of ICIC and/or its nominee or

nominees, [Pharaon] will hold them in a fiduciary capacity for ICIC.

4. ICIC will provide funds to, or otherwise procure a loan for [Pharaon] of the cost of 85% of the said shares of the Bank and in consideration of the premises mentioned in 3 above, ICIC will itself pay or discharge all interest, costs, charges, commission and/or expenses of and incidental to the said loan and repayment thereof and hold [Pharaon] indemnified and harmless in respect thereof.

The agreement also entitled ICIC to dividends issued on its shares, gave ICIC the right to possess Independence's share certificates, and prohibited Pharaon from disposing of ICIC's shares.

Relying on the "right to purchase" language in paragraph three, Pharaon argues that the agreement merely gave ICIC an option to purchase, vesting it with no actual control. The Board rejected this argument, as do we. The agreement plainly states that Pharaon will hold only fifteen percent of Independence beneficially (paragraph two), and that ICIC will fund Pharaon's purchase of the remaining eighty-five percent (paragraph four). Not only does paragraph three itself specifically provide that Pharaon "will hold" the eighty-five percent "in a fiduciary capacity for ICIC," but Naqvi testified that the "right to purchase" language simply clarified BCCI's right to become nominal as well as beneficial owner of the shares.

Pharaon also claims the parties neither effectuated nor followed the agreement, but the record contains substantial evidence to support the Board's contrary finding. The Board pointed to evidence that BCCI provided over $10 million of Independence's $23 million initial purchase price, that BCCI issued a $5 million guarantee to support a $12.6 million loan

Pharaon obtained from the Bank of Boston for the remaining amount of the purchase, and that BCCI later refinanced the Bank of Boston loan, taking physical possession of Pharaon's Independence stock certificates in accordance with the agreement. Additional evidence that the parties implemented the agreement comes from a June 1986 meeting at which Pharaon proposed to Naqvi and Agha Hasan Abedi, then-head of BCCI, to increase his share of Independence from fifteen percent to fifty percent. Subsequently changing his mind, Pharaon sent Naqvi a handwritten note stating that "I would suggest that for the time being the 15/85 arrangement be maintained until we can determine the course we want Independence to take."

Pharaon's other arguments provide no basis for overturning the Board's subparagraph (A) finding. Although he claims that BCCI's financing of Pharaon's purchase of Independence cannot by itself support a finding of control under the Act, the Board's determination that BCCI controlled Independence rested not just on BCCI's financial support, but also on the entire record, including the plain language of the 1985 agreement, the 1986 meeting with Abedi and Naqvi, and Pharaon's follow-up note. Pharaon points to evidence in the record that he too helped manage Independence and contributed to its capital requirements. Because we must consider the entire record before us, however, such evidence in no way undermines the Board's conclusion that BCCI, not Pharaon, controlled Independence. Pharaon claims that the ALJ improperly relied on allegations that he acted as a nominee for BCCI in transactions not at issue in the Independence proceeding. At the beginning of his recommended decision, however, the ALJ made quite clear that he considered such matters only for background and to demonstrate Pharaon's financial condition, not to prove the violations relating to Independence.

While we can uphold the Board's conclusion that BCCI controlled Independence solely on the basis of its subsection (A) finding, we note that the record also contains substantial evidence to support the Board's subsection (B) finding that BCCI controlled the election of at least three members of Independence's five-member board of directors. Abedi selected Kemal Shoaib to serve as Independence's CEO and chairman, Shoaib received pension and other fringe benefits from BCCI, and Shoaib remained in active contact with BCCI while at Independence. A Shoaib letter to Naqvi states that another director, a Morrison & Foerster partner, was "nominated by us." When a third board position opened, Shoaib wrote to Naqvi seeking approval for two potential candidates. Although Pharaon points to some genuine inconsistencies in other ALJ findings about BCCI's involvement in the selection of Independence personnel, the Board's finding that BCCI controlled a majority of the Independence board finds firm support in the record.

Challenging the Board's interpretation of the Act's penalty provisions, Pharaon argues that regardless of BCCI's violations, he cannot be penalized for acting as BCCI's undisclosed nominee. The Board found Pharaon personally liable under section 8(b) of the Act, which authorizes the Board to levy civil penalties against "[a]ny company which violates, and any individual who participates in a violation of, any provision of this chapter, or any regulation or order issued pursuant thereto." 12 U.S.C. § 1847(b)(1). Comprehensively overhauling the regulation of financial institutions in 1989, Congress added a new subsection 1847(d), which provides three tiers of penalties for "any company" that commits a reporting violation. FIRREA § 911(e), 103 Stat. at 481 (codified at 12 U.S.C. § 1847(d)). According to Pharaon, because subsection (d) mentions only companies, individuals are no longer liable for reporting violations under subsection (b). Although the Board responds that repeals by implication are disfavored, we need

not invoke that familiar canon of statutory interpretation because we cannot even discern a basis for implying a repeal. Establishing a range of penalties for reporting violations by *companies,* FIRREA has no bearing on section 1847(b)'s long-standing and still-existing provision for *individual* liability other than to increase maximum penalties from $1000 to $25,000 per day. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter. . . ."). Congress passed FIRREA to strengthen "the enforcement powers of Federal regulators of depository institutions" and "the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." FIRREA § 101(9), (10), 103 Stat. at 187. We cannot imagine that Congress would have exempted individuals from liability for false reports without saying so.

We are equally unpersuaded by Pharaon's argument that the Board lacked evidence to connect him to BCCI's scheme. Sweeping broadly, section 1847(b) reaches any action "causing, bringing about, participating in, counseling, or aiding or abetting" a violation of the Act. 12 U.S.C. § 1847(b)(5). Nothing in the Act requires that Pharaon have known the details of BCCI's plan to conceal its ownership of Independence. *Interamericas Invs., Ltd. v. Board of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 384 (5th Cir. 1997). It is enough, as the Board found, that Pharaon agreed to act as BCCI's nominee. As BCCI's nominee, he could be held responsible for acts undertaken by BCCI to further its secret purchase of Independence, such as filing false reports with U.S. regulators.

III

Having thus upheld the Board's twin findings that BCCI violated the Act by secretly acquiring Independence and that

Pharaon, serving as the scheme's lynchpin, is personally liable as a participant, we turn to Pharaon's procedural challenges. He claims principally that the ALJ improperly denied him discovery and excluded testimony by misapplying the fugitive disentitlement doctrine.

As we read the record, the ALJ mentioned Pharaon's absence as a consideration in connection with just one ruling Pharaon challenges: a July 1995 decision allowing only live testimony at the hearing. Pharaon treats this ruling as a form of fugitive disentitlement. We think the Board offers a more accurate interpretation: The ALJ did not punish Pharaon for his fugitive status, but merely relied on what the Board referred to in its 1994 decision as his "express and implicit procedural powers" to ensure that Pharaon's fugitive status not adversely affect the hearing. Later making this point explicit, the ALJ explained that "the importance of visual observations of witnesses" significantly influenced his ruling requiring Pharaon to appear in person. Given the significance of personal observation to credibility determinations, we cannot say that this ruling amounted to an abuse of discretion. We reach the same conclusion with respect to another ruling, also challenged by Pharaon, in which the ALJ "similarly order[ed]" that a witness Pharaon proposed on the eve of the hearing could only appear in person.

Citing fugitive disentitlement, Pharaon challenges several other discovery rulings. *See* Pet'r Br. at 53 ("Pharaon was thus denied the basic rudiments of due process, apparently based on the disentitlement doctrine."). Because none of the rulings rested on fugitive disentitlement, however, we need not consider them further.

Pharaon also claims that the Board failed to disclose 127 unspecified files of relevant documents and an agreement with the New York District Attorneys' Office immunizing Naqvi for his testimony. Offering no grounds to support

these challenges, Pharaon has waived them. *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 2431 (1997).

Next, Pharaon claims ALJ bias, relying chiefly on a statement made by the ALJ in his 1993 ruling on fugitive disentitlement. Claims of bias must "be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." *Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) (footnote omitted). Aware of the ALJ's alleged bias when he appealed the recommended decision to the Board, Pharaon failed to raise the issue or argue that the case should be remanded to a different ALJ. He has thus waived his principal ground for asserting bias. Other evidence of alleged bias—the ALJ's record of ruling in favor of the Board in other proceedings and his allegedly incorrect rulings against Pharaon in this case falls far short of demonstrating that the ALJ had "a fixed opinion 'a closed mind on the merits of the case.'" *Throckworton v. NTSB*, 963 F.2d 441, 445 (D.C. Cir. 1992) (quoting *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976)). "Almost invariably, [such rulings] are proper grounds for appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

Pharaon's final procedural challenge, presented only in a sparse footnote, invokes 5 U.S.C. § 557(c), which states that "[b]efore . . . a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit . . . exceptions to the . . . recommended decision[ ] . . . [and][t]he record shall show the ruling on each . . . exception presented." Pharaon faults the Board for failing to respond with specificity to each of his many exceptions to the ALJ's recommended decision. Section 557(c) functions as a bedrock of judicial review of agency action. We have long held, however, that agencies

need only indicate that they have considered and rejected a party's exceptions, *see Human Dev. Ass'n v. NLRB*, 937 F.2d 657, 668 (D.C. Cir. 1991), and that they have no obligation to respond at all to entirely insubstantial arguments, *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 792 F.2d 241, 247-48 (D.C. Cir. 1986). "Assum[ing]" Pharaon to be challenging the ALJ's recommended decision "in its entirety," the Board said that it had reviewed Pharaon's submission and denied his exceptions. From our own review of the Board's decision and Pharaon's exceptions, we are satisfied that the agency in fact considered and rejected all of them. To be sure about this, at oral argument we asked Pharaon's counsel to identify any significant exceptions to which the Board failed to respond. He offered none.

IV

This brings us finally to Pharaon's statutory and constitutional challenges to the penalties. In keeping with our limited review of agency penalty assessments, we will not overturn the Board's choice of sanctions unless they are either "'unwarranted in law or . . . without justification in fact.'" *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1294 (D.C. Cir. 1996) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973)) (ellipsis in original).

Citing the difference between his thirty-seven million dollar penalty and the range of penalties set out in a Board Civil Money Penalty Assessment Matrix and claiming the Board failed to follow a thirteen-factor test set forth in an Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423, 59,424-25 (1980), Pharaon urges us to set aside the penalty as arbitrary and capricious

in violation of the APA. According to the Board, neither the matrix nor the interagency policy limits its discretion.

We agree with the Board about the matrix. An internal, staff-level guideline, the matrix cautions that "because the facts and circumstances of each penalty case are different, the assessment of a civil money fine cannot be completely reduced to the mechanical application of a formula or purely numerical index. The exercise of judgment based on expertise and experience is important and necessary." Because the matrix does not constrain the Board's discretion, the agency had no obligation to explain any departure from it. *See, e.g., Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988) (where no indication that agency intended to bind itself by staff memorandum, document not binding).

In contrast to the matrix, the Board has expressly adopted the interagency policy. *See In re Cedar Vale Bank Holding Co.*, 82 Fed. Res. Bull. 871 (1996), *aff'd sub. nom. Long v. Board of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145 (10th Cir. 1997). Considering the factors listed in the interagency policy, the ALJ concluded that Pharaon's violations would yield a penalty of slightly over $151 million, well above the statutory maximum. Although the Board's January 1997 final decision does not review each factor in turn, a comparison of the Board's decision with the interagency policy indicates that the Board in fact considered each factor relevant to this case. When we asked Pharaon's counsel about this at oral argument, he was unable to point to any relevant factor the Board ignored.

Pharaon correctly observes that the Board nowhere tells us how its enforcement counsel originally selected thirty-seven million dollars. But we will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also Detroit/Wayne County Port Auth. v. ICC*, 59 F.3d 1314, 1317 (D.C. Cir. 1995). This is just such a case. Thirty-seven million dollars reflects the approximate amount the Board found BCCI invested in Independence, as well as approximating the magnitude of the gains sought and the potential harm posed by Pharaon's facilitation of BCCI's secret takeover of a bank worth several hundred million dollars. After weighing the mitigating factors set forth in 12 U.S.C. § 1818(i)(G)(i)-(iv) —"(i) the size of financial resources and good faith of the . . . person charged; (ii) the gravity of the violation; (iii) the history of previous violations; and (iv) such other matters as justice may require"— the Board found the penalty "in line with the gravity of the offenses, the intentional nature of the actions, [and] the attempts to conceal the nature of the transactions." Under all of these circumstances, we find nothing arbitrary and capricious in the Board's selection of the penalty. Indeed, had the Board applied the penalty standards set forth in 12 U.S.C. § 1847(b), as Board enforcement counsel urged, it could have imposed a penalty of over $111 million, three times the amount it actually assessed. Although Pharaon challenged the calculation of this maximum penalty before the Board, he does not do so here.

Pharaon's principal constitutional challenge to the thirty--seven million dollar penalty rests on the Eighth Amendment's Excessive Fines Clause, U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Protecting individuals against government power to extract payments as punishment, *Austin v. United States*, 509 U.S. 602, 609-10 (1993), the Excessive Fines Clause requires us to consider the "'value of the fine in relation to the offense.'" *United States v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997) (quoting *Austin*, 509 U.S. at 627 (Scalia, J., concurring)), *cert. denied*, 118 S. Ct. 61 (1997). Reviewing

the question *de novo, see Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992), we discern no Eighth Amendment violation. As we have already indicated in rejecting Pharaon's APA challenge, the penalty is proportional to his violation and well below the statutory maximum.

Pharaon's Fifth Amendment claim has even less merit. He relies on the Supreme Court's statement in *BMW of North Am. v. Gore*, 116 S. Ct. 1589 (1996), that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 1598. Here, section 1847(b)'s maximum penalty provisions provided just that notice. Because the assessed penalty falls far below the statutory maximum, Pharaon cannot claim that he lacked constitutionally adequate notice. *Cf. Long*, 117 F.3d at 1156 (upholding a $717,941 penalty against due process challenge when statute authorized Board to assess a maximum penalty of $45.6 million). We need not consider Pharaon's Double Jeopardy claim because he failed to include it in his exceptions to the ALJ's recommended decision. *See* 12 C.F.R. § 263.39(b)(1) (1997) (failure to raise exception constitutes waiver).

For his final argument, Pharaon claims that the Board had no basis under 12 U.S.C. § 1818(e)(1)(A)-(C) for its order permanently barring him from participating in the affairs of any federally insured depository. He offers no challenge to the Board's subsections (A) and (C) findings, and for good reason: It is undeniable that he "violated [the] law," *id.* § 1818(e)(1)(A)(i), and that his violation at least "involve[d] personal dishonesty," *id.* § 1818(e)(1)(C). Pharaon claims only that the record contains insufficient evidence to support the Board's finding under subsection (B), the so-called effects prong, *see Oberstar v. FDIC*, 987 F.2d 494, 502 (8th Cir. 1993), which requires that the Board establish that:

> by reason of the violation . . . (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage; (ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach.

12 U.S.C. § 1818(e)(1)(B).

According to Pharaon, subsection (B) requires the Board to demonstrate the exact amount of harm caused by Pharaon's participation in BCCI's scheme. The plain language of the statute provides to the contrary, however. Section 1818(e)(1)(B) allows the Board to impose an order of prohibition not only if the insured institution "suffered . . . financial loss or other damage" or if the interests of its depositors "have been . . . prejudiced," but also if the institution "will probably suffer financial loss or other damage" or if its depositors "could be prejudiced." *Id.* Under all the circumstances of this case, we think the Board had ample basis for concluding that as a result of BCCI's secret takeover of Independence and Pharaon's participation in the scheme, BCCI "will probably suffer financial loss or other damage" and its depositors "could be prejudiced." Indeed, BCCI's unrecoverable investment in the now-defunct Independence represents adequate "financial loss or other damage" for purposes of the prohibition order.

V

Because the Board's findings of fact are supported by substantial evidence in the record and because we discern no reversible errors in the Board's procedures, legal conclusions, or choice of sanctions, we affirm.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1114 **September Term, 1997**

Ghaith R. Pharaon
Petitioner

v.

Board of Governors of
the Federal Reserve System,
Respondent

Before: GINSBURG, HENDERSON, and TATEL, *Circuit Judges*.

ORDER

It is Ordered, by the Court, that the opinion filed February 10, 1998 is amended, as follows:

At page 13, lines 8-13

Delete: "Thirty-seven million dollars reflects the approximate amount the Board found BCCI invested in Independence, as well as approximating the magnitude of the gains sought and the potential harm posed by Pharaon's facilitation of BCCI's secret takeover of a bank worth several hundred million dollars."

At page 15, lines 21-24

Delete: "Indeed, BCCI's unrecoverable investment in the now-defunct Independence represents adequate 'financial loss or other damage' for purposes of the prohibition order."

PER CURIAM
FOR THE COURT:

Mark J. Langer, Clerk

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the matter of GHAITH R. PHARAON, Institution-Affiliated Party of BCCI Holdings (Luxembourg) S.A., Luxembourg, and the Bank of Credit and Commerce International S.A., (Luxembourg)	Docket Nos. 91-037-E-I1 91-037-CMP-I1

FINAL DECISION

This is an administrative proceeding of the Board of Governors of the Federal Reserve System (the "Board"), based on the issuance on September 13, 1991 of its "Notice of Assessment of a Civil Money Penalty Issued Pursuant to Section 8(b) of the Bank Holding Company Act of 1956, As Amended, and Amended Notice of Intent to Prohibit Issued Pursuant to Section 8(e) of the Federal Deposit Insurance Act, As Amended" (the "Amended Notice"). The Amended Notice alleges that Bank of Credit and Commerce International ("BCCI")[1] violated

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[1] "BCCI" refers to BCCI Holdings (Luxembourg), S.A., Luxembourg ("BCCI Holdings") and all of its related entities, including its subsidiary bank, the Bank of Credit and Commerce International, S.A., Luxembourg ("BCCI, S.A."), ICIC Holdings, its subsidiary bank, International Credit and Investment Company (Overseas) Limited, George Town, Cayman Islands ("ICIC Overseas"), ICIC Investments, Ltd.

(continued...)

Section 3(a) of the Bank Holding Company Act (the "BHC Act"), 12 U.S.C. § 1842(a), by causing BCCI to become a bank holding company without prior Board approval by secretly acquiring an 85 percent interest in Independence Bank, a state-chartered non-member insured depository institution located in Encino, California ("Independence Bank"). The Amended Notice also alleges that BCCI violated Section 5(c) of the BHC Act, 12 U.S.C. § 1844(c), by filing false and misleading reports with the Board which failed to disclose BCCI's interest in Independence Bank. The Amended Notice further alleges that Respondent Ghaith R. Pharaon ("Pharaon") is an institution-affiliated party of BCCI pursuant to 12 U.S.C. § 1813(u),[2] and that as such Pharaon "caused, brought about, participated in, or aided and abetted" BCCI's

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[1](...continued)
("ICIC Investments") (also a subsidiary of ICIC Holdings), ICIC Staff Benefit Trust and ICIC Foundation, unless the context requires reference to a specific BCCI entity. See Recommended Decision at 1 n.1.

[2] "Institution-affiliated party" is defined in Section 3(u) of the Federal Deposit Insurance Act (the "FDI Act") as "any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution." 12 U.S.C. § 1813(u). These proceedings are instituted under the civil money penalty provisions of the BHC Act, 12 U.S.C. § 1847(b), and under the prohibition provisions of the FDI Act, 12 U.S.C. § 1818(e). Section 1818(e) is applicable with respect to bank holding companies by operation of 12 U.S.C. § 1818(b)(3), which provides that 12 U.S.C. § 1818(b)-(s) and 12 U.S.C. § 1818(u) "shall apply to any bank holding company, . . . in the same manner as they apply to a State member insured depository institution."

violations of the BHC Act. The Amended Notice seeks the imposition against Pharaon of an industry-wide prohibition order and of civil money penalties in the amount of $37 million.

OVERVIEW

The first BCCI institution was organized in 1972. By 1985, BCCI had operations in nearly seventy countries, including the United States. Also by that time, BCCI had accumulated losses which far exceeded its stated capital. BCCI concealed these losses from banking regulators around the world in many ways, including embezzling from its customers, creating fictitious loans to disguise actual non-performing loans, and making secret investments through nominees in high-growth enterprises. BCCI intended that the profits resulting from these secret investments, together with the proceeds of normal banking activities, would enable BCCI to recoup its losses.

Before BCCI had successfully recouped its losses, however, the Luxembourg banking authorities refused to continue to serve as BCCI's home country supervisor.[3] Forced to find a new home country supervisor for its worldwide banking operations, BCCI decided to establish its home country in the United States and therefore to be supervised by United States banking regulators. To accomplish this, BCCI planned to acquire an existing bank in the United States.

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[3] Under the principles governing international bank supervision, supervision of an international financial organization is divided between the country where the institution is chartered, its "home country," and any country where an institution conducts business, a "host country." See RD at 10-11.

BCCI apparently knew it could not obtain regulatory approval at that time to acquire a United States bank, however, because neither BCCI's undisclosed losses nor its illicit attempts to conceal them would survive the scrutiny of the application process. BCCI therefore decided to acquire a United States bank through a nominee, who would acquire the bank on behalf of BCCI and with BCCI funds in exchange for various kinds of compensation. While the nominee would possess the credentials necessary to receive regulatory approval as the ostensible owner of the bank, BCCI would in reality control the bank. One bank BCCI selected for this undertaking was Independence Bank. The nominee BCCI selected was Ghaith Pharaon.

BCCI and Pharaon signed an agreement, undisclosed to United States banking regulators, pursuant to which Pharaon would acquire and hold as the registered owner 100 percent of the shares of Independence Bank. In reality, pursuant to this agreement, Pharaon was to hold only 15 percent of the stock as beneficial owner and 85 percent as the nominee of BCCI. BCCI funded Pharaon's acquisition of the Independence Bank shares through loans to Pharaon under which BCCI would have no recourse to Pharaon personally, but only to the shares themselves. BCCI approved the appointment of four of the five members of the board of directors of Independence Bank, and also filled senior management positions at Independence Bank with BCCI personnel.

The plan envisioned that, at a later time (and presumably after BCCI had improved its financial condition), BCCI would attempt to obtain regulatory approval to purchase Independence Bank from Pharaon, thus making BCCI's existing holding company a bank holding company subject to supervision under United States law by the Federal Reserve System. However, BCCI's various plans to recoup its losses were not

successful, and BCCI failed on July 5, 1991. The Board initiated these proceedings in September of 1991, and Independence Bank itself failed in January of 1992.

RECOMMENDED DECISION, EXCEPTIONS AND SUMMARY OF FINAL DECISION

After a nineteen-day hearing, Administrative Law Judge Walter J. Alprin issued his Recommended Decision on April 12, 1996 (the "Recommended Decision" or "RD"). In the Recommended Decision, Judge Alprin found that Pharaon was an institution-affiliated party of BCCI who violated Sections 3 and 5 of the BHC Act by participating in BCCI's acquisition of unauthorized control of Independence Bank through acts of personal dishonesty. RD at 3. Judge Alprin recommended the imposition of civil money penalties in the amount of $37 million and the institution of an industry-wide prohibition order against Pharaon, both as sought in the Amended Notice.

Board Enforcement Counsel ("Board Enforcement Counsel" or "BEC") and Pharaon filed exceptions to the Recommended Decision, and each party filed a response to the other's exceptions. BEC excepted only to the amount of civil money penalties recommended by Judge Alprin, arguing that Judge Alprin should have recommended the imposition of $111,595,000 sought by BEC instead of the $37,000,000 he recommended. Pharaon excepted "to virtually every finding of fact, and to all conclusions of law" in the Recommended Decision. Pharaon's Exceptions ("PE") at 2.[4]

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[4] Pharaon in his exceptions failed to "set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which

(continued...)

Upon review of the entire administrative record herein, including all post-trial submissions of the parties, the Board adopts the Administrative Law Judge's Recommended Decision, Recommended Findings of Preliminary Fact and Recommended Conclusions of Law, except as specifically supplemented or modified herein. The Board accordingly determines that the attached Final Order of Prohibition and Assessment of Civil Money Penalty shall issue against Pharaon.

DISCUSSION

1. DIRECT OR INDIRECT CONTROL OF INDEPENDENCE BANK

Section 3(a) of the BHC Act requires prior Board approval before a company becomes a bank holding company. 12 U.S.C. § 1842(a). A "bank holding company" includes any company which has control over any bank. 12 U.S.C. § 1841(a)(1). Section 2(a)(2) of the BHC Act defines "control" as follows:

> Any company has control over a bank or over any company if--
>
> (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

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[4](...continued)
exception is taken," as required by Section 39(c)(2) of the Board's Uniform Rules of Practice and Procedure applicable to these proceedings. 12 CFR § 263.39(c)(2). Because of this failure, the Board assumes that Pharaon excepted to the Recommended Decision in its entirety.

(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

12 U.S.C. § 1841(a)(2). Under Section 11(a) of the Board's Regulation Y, implementing this statutory provision, a prior application to the Board for the formation of a bank holding company is required. 12 CFR § 225.11(a).

In the Recommended Decision, Judge Alprin found that BCCI, without obtaining prior Board approval, controlled more than 25 percent of the voting shares of Independence Bank within the meaning of Section 2(a)(2)(A) of the BHC Act through its affiliated entities and through Pharaon as its nominee (RD at 88-99, 103-104), and through financing arrangements (RD at 99-102, 103-104). Judge Alprin also found that BCCI, without obtaining prior Board approval, controlled the appointment of a majority of Independence Bank's directors within the meaning of Section 2(a)(2)(B) of the BHC Act. RD at 102-104.

A. Control Under Section 2(a)(2)(A) of the BHC Act

(1) The Acquisition Agreement

Judge Alprin found that Pharaon illegally acted on behalf of BCCI as its undisclosed agent when he became the registered holder of the stock of Independence Bank pursuant to the terms of a written agreement, undisclosed to United States banking regulators, between Pharaon and BCCI (the "Acquisition Agreement"). The Acquisition

Agreement is a three-page document titled "Memorandum re: Acquisition of Shares of Independance [sic] Bank of _____ [sic] (the Bank)," dated May 17, 1985 and signed by Pharaon and by Swaleh Naqvi ("Naqvi") on behalf of ICIC Overseas.

Pharaon vigorously disputes that the Acquisition Agreement granted control of Independence Bank for purposes of the BHC Act to ICIC Overseas, to BCCI or to anyone other than Pharaon.[5] PE at 144-156. Pharaon argues first that the parties never implemented the Acquisition Agreement and/or never considered it to be valid and effective. PE at 38, 145-148. Pharaon further argues that to the extent the Acquisition Agreement permitted BCCI to have illegal control over Independence Bank, that agreement was illegal and unenforceable and therefore a nullity. Id. The Board concurs in Judge Alprin's finding that the Acquisition Agreement "has been clearly demonstrated to be a written expression of the intent of the parties, subject to intermediate changes but never varying the intended goal." RD at 98.

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[5] Judge Alprin found that BCCI controlled ICIC Overseas, on whose behalf Naqvi executed the Acquisition Agreement. Specifically, Judge Alprin found that: BCCI controlled ICIC Staff Benefit Trust under Section 2(g)(2)(C) of the BHC Act; ICIC Staff Benefit Trust controlled ICIC Holdings within the meaning of Section 2(a)(2)(A) of the BHC Act because one-half of all the shares of ICIC Holdings were held in a fiduciary capacity for the benefit of ICIC Staff Benefit Trust; and ICIC Holdings controlled ICIC Overseas within the meaning of Section 2(a)(2)(A) of the BHC Act because ICIC Overseas was ICIC Holdings' wholly-owned subsidiary. RD at 88-92.

Pharaon argues next that the Acquisition Agreement was or was intended to be an option agreement. See, e.g., PE at 37, 42, 145-148. Judge Alprin found that the Acquisition Agreement was not intended to be an option agreement, given the intent of the parties thereto, the action of the parties in accordance therewith enabling BCCI to control Independence Bank, an economic analysis thereof, and the evidence that Pharaon knew the difference between a true option agreement and a nominee agreement like the Acquisition Agreement. RD at 92-96. The Board concurs in Judge Alprin's finding that the Acquisition Agreement constituted a nominee agreement which Pharaon and BCCI intended to enter and did in fact enter and carry out, and through which BCCI controlled Independence Bank for purposes of the BHC Act.

(2) Control Through Financing Arrangements

The Recommended Decision set forth in detail how BCCI financed the acquisition of 100 percent of the stock of Independence Bank (RD at 34-51, 99-102), and the nature of the financial arrangements between BCCI and Pharaon (RD at 51-60), particularly the significant number and dollar amount of nonrecourse loans extended to Pharaon (RD at 51-56). Judge Alprin noted that prior Board decisions had found preferential financing arrangements for the acquisition of bank stock effective to transfer control of an acquired bank for purposes of the BHC Act. RD at 99-102. Applying that precedent, Judge Alprin concluded that by virtue of the financing arrangements BCCI extended for the purchase of the Independence Bank stock, BCCI controlled more than 25 percent of the voting shares of Independence Bank, and that therefore BCCI violated Section 3(a) of the BHC Act. RD at 102.

Pharaon argues that the precedents which Judge Alprin discussed are inapposite because they involved applications decisions rather than civil money penalties. Neither Pharaon nor BCCI ever applied to the Board for approval of BCCI's acquisition of Independence Bank. On the contrary, Pharaon and BCCI agreed to avoid seeking regulatory approval by having Pharaon act as BCCI's undisclosed nominee in acquiring Independence for the benefit of BCCI, because they realized that BCCI could not pass regulatory scrutiny. See, e.g., RD at 17 ¶ 27; RD at 18 ¶ 29; RD at 27 ¶ 43-44. The fact that those control decisions involved applicants following proper procedures does not mean that they do not apply to BCCI's acquisition of Independence Bank. Rather, they support the position that BCCI controlled Independence Bank. Pharaon also argues that Pharaon, and not BCCI, bore the risk in the Independence Bank acquisition and that therefore control could not be imputed to BCCI. Specifically, Pharaon argues that he and not BCCI bore the risk of the acquisition because he "paid at least the interest on one account," (PE at 155 n.105) and because he "never received full indemnification from BCCI in connection with his acquisition of Independence Bank." PE at 155. Even if true, these assertions would not refute control by BCCI. Moreover, they are outweighed by the other evidence of record establishing that BCCI and not Pharaon bore all or virtually all risk associated with the acquisition of Independence Bank. Accordingly, the Board concurs in Judge Alprin's finding that, within the meaning of Section 2(a)(2)(A) of the BHC Act, BCCI controlled the shares of Independence Bank and that, through this control, BCCI violated Section 3(a) of the BHC Act. RD at 102.

B. Ability to Appoint Majority of Directors

Judge Alprin concluded that BCCI also violated Section 3(a) of the BHC Act through its control of the election of a

majority of the directors of Independence Bank within the meaning of Section 2(a)(2)(B) of the BHC Act. RD at 102-103. Pharaon contends in his exceptions that "only [one director] could arguably have been 'selected by BCCI' and [that director] believed he was working for Pharaon." PE at 85-86 (emphasis in original). However, Pharaon has failed to refute Judge Alprin's findings that BCCI exercised control over four of the five seats on Independence Bank's board of directors through BCCI's direct appointment, recruitment, consent to appoint and rejection of proposed candidates. RD at 102-103. Therefore, the Board concurs in Judge Alprin's finding that BCCI impermissibly controlled Independence Bank through its ability to control the appointment of a majority of the directors of Independence Bank.

C. Conclusion On Section 3(a) of the BHC Act

For the foregoing reasons, the Board concludes that BCCI violated Section 3(a) of the BHC Act because BCCI controlled Independence Bank within the meaning of Section 2(a)(2)(A) and Section 2(a)(2)(B) of the BHC Act. The Board further concludes that, through his participation in BCCI's violation, Pharaon violated Section 3(a) of the BHC Act within the meaning of Section 8(b)(5) of the BHC Act.

2. PARTICIPATION IN FILING FALSE AND MISLEADING REPORTS UNDER SECTION 5 OF THE BHC ACT

Foreign banks operating branches or agencies within the United States are required to file annual "Y-7" reports with the Board by a regulation implementing the Board's authority under the BHC Act to require reports. 12 U.S.C. § 1844(c); 12 CFR § 225.5(b); 12 CFR

§ 225.2(c)(2). Under this requirement, BCCI Holdings,[6] as an entity controlling a foreign bank that operated agencies in the United States, filed Y-7 reports with the Federal Reserve in 1986, 1987, 1988 and 1989. In each of these Y-7 reports, BCCI Holdings stated that it had no ownership interests in banks in the United States, even though BCCI in reality had a beneficial interest in Independence Bank. See RD at 77-78.

Judge Alprin found that BCCI's Y-7 reports were false and misleading because, contrary to the statements in those reports, BCCI in fact controlled Independence Bank. RD at 104. Judge Alprin found that Pharaon participated in BCCI's violation of Section 5(c) by filing an application with the California State Banking Department and a notice with the Federal Deposit Insurance Corporation (the "FDIC"), both of which falsely indicated that Pharaon was the sole owner of Independence Bank. Id. Pharaon argues that because there is no evidence that Pharaon knew what a Y-7 was, what a Y-7 contains, or even whether BCCI filed Y-7's or any other reports with the Board, he cannot have "participated" in BCCI's violation of Section 5(c). PE at 157-158.

The Board concurs in Judge Alprin's rejection of this argument. Both Pharaon and BCCI knew that the successful execution of their scheme to defraud government regulators and avoid regulatory scrutiny required that BCCI's interest in Independence Bank remain secret. Pharaon was, and intended to be, an integral part of this scheme. Pharaon was indispensable to the illusion, reflected in the Y-7 reports and in all reports to United States banking regulators, that he, and not BCCI, controlled Independence Bank. This illusion could not

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[6] See note 1 supra.

have been sustained had Pharaon not continued to act as BCCI's nominee, and had he himself not submitted false reports to the California State Banking Department and to the FDIC. Had Pharaon not filed deceptive reports with the California State Banking Department and the FDIC (or had Pharaon failed to file reports at all), the fraudulent scheme reflected in BCCI's Y-7 reports would have been exposed and brought to an end more quickly. Instead, Pharaon's participation enabled that deception to remain undetected for over four years.

The BHC Act states that the Board may impose a civil money penalty upon "[a]ny company which violates, and any individual who participates in a violation of, any provision of this chapter, or any regulation or order issued pursuant thereto." 12 U.S.C. § 1847(b)(1). The BHC Act defines "violation" as "includ[ing] any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. § 1847(b)(5). The combined application of these two statutory provisions encompasses any kind of participation by an individual in aiding or abetting a violation of the BHC Act. Even unknowing participation comes within this definition of a "violation." "This extremely broad definition clearly includes any action, intentional or inadvertent, by which [an individual]'participates in' the bank's violation of the [statute]." Lowe v. FDIC, 958 F.2d 1526, 1535 (11th Cir. 1992) (construing parallel language in 12 U.S.C. § 1828(j)(4)). Therefore, even if Pharaon were unaware of all of the details through which the scheme was implemented, it does not negate his status as a violator of the BHC Act. Accordingly, the Board concurs in Judge Alprin's findings and conclusion that Pharaon violated Section 5(c) of the BHC Act by participating in BCCI's violation of Section 5(c).

3. CIVIL MONEY PENALTIES AND ORDER OF PROHIBITION

A. Civil Money Penalties

In the Recommended Decision, Judge Alprin recommended the imposition of civil money penalties in the amount of $37 million, the same amount sought in Board Enforcement Counsel's Amended Notice. RD at 127. In so doing, Judge Alprin evaluated in the circumstances of this enforcement proceeding the statutory factors required to be considered in assessing a civil money penalty.[7] Judge Alprin found that none of the mitigating factors applied to reduce the amount of civil money penalties sought against Pharaon. RD at 114-121. In particular, Judge Alprin found that Pharaon had failed to offer any evidence of a substantive change in his financial or economic position since 1985, when he represented his net worth to be nearly $500 million. RD at 114. In addition, Judge Alprin found that there was no evidence of good faith and that Pharaon's violations were "especially grave." RD at 115. Furthermore, Judge Alprin found that Pharaon violated other laws in addition to his violations of Sections 3 and 5 of the BHC Act. RD at 119. Finally, Judge Alprin found that "[t]he record in this matter includes no factors that would tend to mitigate civil money penalties against Pharaon." RD at 121. Judge Alprin observed, however, that "insofar as the transactions

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[7] Section 8(b) of the BHC Act, 12 U.S.C. § 1847(b), incorporates the mitigation factors set forth in Section 8(i)(2)(G) of the FDI Act, 12 U.S.C. § 1818(i)(2)(G); specifically: Respondent's financial resources; Respondent's good faith; the gravity of the violation; the history of previous violations; and "such other matters as justice may require."

with Independence are concerned, Pharaon did not enjoy any material financial or other benefit." RD at 127.

In addition, Judge Alprin "undertook an application" of the factors set forth in the Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423 (1980) ("Interagency Policy"), in arriving at the recommended penalty amount. RD at 126-127, as corrected by "Corrections to Recommended Decision" (Apr. 15, 1996). Judge Alprin concluded that applying the Interagency Policy in this case "resulted in computation of a civil money penalty of slightly over $151 million, while the cap on such computation remains at the maximum penalty, here at most just over $111 million." Id.

Both parties excepted to the recommended amount of civil money penalties. Board Enforcement Counsel argued that Judge Alprin should have imposed the maximum penalty of $111,595,000. Based upon an order entered earlier in the case bifurcating this enforcement proceeding to limit it to the acquisition of Independence Bank, Judge Alprin refused to increase the amount of penalties sought. RD at 112-113. As a result, Judge Alprin recommended the imposition of civil money penalties in the amount of $37 million as requested in the Amended Notice, stating that "in spite of the egregiousness of Pharaon's wilful, knowing, continuing violations engaged in with absolute disregard for accuracy of reports or for any consideration of the requirements of law, . . . [$37 million] is a very meaningful figure, in line with the gravity of the offenses, the intentional nature of the actions, [and] the attempts to conceal the nature of the transactions that also took into account both Pharaon's financial means and the failure to establish an evidentiary link between Pharaon and the Independence Bank transactions by themselves. RD at 127, as corrected by "Corrections to Recommended

Decision" (Apr. 15, 1996). The Board concurs in Judge Alprin's findings and reasoning on this issue, and accordingly concurs in the determination in the Recommended Decision not to impose civil money penalties in excess of the amount originally sought.

In addition to his Constitutional challenges to the amount of the recommended penalty,[8] Pharaon in his exceptions argues that Judge Alprin erroneously failed to reduce the amount in response to Pharaon's lack of financial gain from the violations (PE at 163-164), that there is no evidence that he intended to violate the BHC Act (PE at 165-167), that the penalty assessed "does not comport with the Board's own guidelines" (PE at 167), and that there is no evidence of Pharaon's current financial condition (PE at 169). As discussed below, the Board rejects each of these arguments.

(1) Pharaon's Lack of Financial Gain

Pharaon argues that "[he] was found to have received no pecuniary gain whatsoever." PE at 163. However, in the Recommended Decision Judge Alprin's recommendation is not based on any finding of pecuniary gain, but rather the "gravity of the offenses, the intentional nature of the actions, the attempts to conceal the nature of the transactions, the expected levels of profit and the realities of loss." RD at 127. Indeed, a finding of financial gain might well have resulted in the recommendation of a higher penalty.

The Recommended Decision notes that the longstanding nature of the relationship between Pharaon and BCCI, and the manner in which Pharaon and BCCI structured and

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[8] See infra at 4., pp. 24-29.

conducted that relationship, do not permit a determination that a specific reward was or was not tied to a specific transaction. RD at 110-111, 127. The record is clear that Pharaon and BCCI never contemplated a disaggregated series of actions and rewards, but rather that the overall plan would yield profits in which Pharaon would share. The parties to the relationship made it impossible to determine the benefit Pharaon derived from service as BCCI's nominee for the acquisition of control of Independence Bank.

(2) Pharaon's Lack of Intent to Violate the BHC Act

Pharaon argues that, in order to impose civil money penalties in this case, Board Enforcement Counsel was required specifically to prove that Pharaon intended to violate the BHC Act and Regulation Y. PE at 165. It is clear from the statutory text that a showing of intent or scienter is not necessary to impose civil money penalties. Congress is explicit when it intends to require scienter for banking offenses. See 12 U.S.C. § 1818(i)(2) (providing three "tiers" of increasing amounts of civil money penalties for, respectively, "violations," "reckless" activities, and "knowing" violations). The civil money penalty provisions for violation of the BHC Act, on the other hand, have no such requirement, demonstrating a conscious legislative choice. There is therefore no basis in the BHC Act for Pharaon's asserted scienter requirement. Furthermore, even if there were such a requirement, the record is clear that Pharaon and BCCI intentionally violated U.S. banking laws by intentionally deceiving and making affirmative misrepresentations to U.S. banking regulators. Accordingly, the Board rejects Pharaon's exceptions on the issue of scienter.

(3) Comportment with Board Guidelines

Pharaon claims in his exceptions that Judge Alprin failed to comport with Board guidelines in arriving at the recommended amount of civil money penalties. Pharaon argues that Judge Alprin failed to set forth his analysis of the case under the Interagency Policy. PE at 162. However, Judge Alprin concluded that such an analysis would have resulted in a figure far in excess of the statutory maximum, let alone the amount sought by Board Enforcement Counsel. RD at 126-127, as corrected by "Corrections to Recommended Decision" (Apr. 15, 1996). Accordingly, the Board is unable to discern any prejudice to Pharaon by the absence of an analysis which would have produced an unusable, and unused, result.

Similarly, Pharaon argues that in bringing this enforcement action for the recovery of $37 million in civil money penalties, the Board "ignored its own procedures" (PE at 161), referring to a 1991 supervisory letter relating to the assessment of civil money penalties. PE at 167, citing SR 91-13 (FIS) (June 3, 1991). The supervisory letter was an internal guideline and does not have the status of a regulation. It was not issued pursuant to a notice of proposed rulemaking or a public comment period as required under the Administrative Procedure Act (5 U.S.C. § 551), nor was it published with the Board's formally adopted rules in the Code of Federal Regulations.[9] Accordingly, it is a general statement of Board policy that is not binding on the Board. See Used Equipment Sales, Inc. v. Department of Transportation, 54

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[9] In practice, the letter is used for guidance in recommending the initiation of enforcement actions, and has never been used by the Board in determining the amount of a final assessment.

F.3d 862, 867 (D.C. Cir. 1995); Amrep Corp. v. Federal Trade Commission, 768 F.2d 1171, 1178 (10th Cir. 1985). Indeed, even if it were more formally part of the Board's decisional process, it would not bind the Board. See OTS v. Rapp, 52 F.3d 1510, 1522 (10th Cir. 1995) (OTS never intended to bind itself to its matrix; "petitioners had no reasonable or legally protected expectation that the OTS would apply matrix methodology in their case").[10] Accordingly, the Board rejects Pharaon's exceptions on this point.

(4) Pharaon's Current Financial Condition

Pharaon claims that the recommended amount of civil money penalties cannot stand because Board Enforcement Counsel failed to introduce evidence of Pharaon's current financial condition. See, e.g., PE at 169; Transcript at 3659:2-5 (Oct. 18, 1995). For his part, Pharaon claims that he could not introduce evidence of his own current financial condition because "BEC did everything possible to prevent Pharaon from testifying." PE at 169. However, such evidence could have been introduced other than through Pharaon's own testimony. The fact that Pharaon failed to offer any evidence to rebut the record evidence of his great wealth does not shift the burden to Board Enforcement Counsel to introduce mitigation evidence on Pharaon's behalf. Stanley v. Board of

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[10] Pharaon attempted improperly to introduce this supervisory letter through a declaration of counsel attached to his exceptions. The Board need not consider any matter so submitted, since it constitutes an attempt to introduce additional evidence into the record after the conclusion of the hearing, and does not address the matters contained in or omitted from the Recommended Decision. See 12 CFR § 263.39(c)(1).

Governors of the Federal Reserve System, 940 F.2d 267, 274 (7th Cir. 1991) ("An awkward state of affairs would arise if the Board was required to bear full responsibility for proving the financial condition of the individual Directors who obviously oppose higher penalties and whose self-interest is served by painting as grim a picture as possible of their respective financial conditions"). As Judge Alprin found in the Recommended Decision:

> In 1985, [Pharaon] declared his net worth to be almost half-a-billion [sic] dollars. Having established this as a point of consideration the Enforcement Counsel met their burden of proof, and during the hearing, Pharaon offered no evidence to indicate any substantive change in his financial or economic position since 1985.

RD at 114. The Board concurs in Judge Alprin's findings on this issue, and accordingly rejects Pharaon's exceptions.

(5) Conclusion on Civil Money Penalties

In summary, the BHC Act authorizes civil money penalties in the amount of $5,000 per day (pre-FIRREA) and $25,000 per day (post-FIRREA) for each day the violation continues. In this case, application of these amounts would result in a penalty of over $111 million. The $37 million amount of civil money penalties recommended clearly falls within the Board's statutory authorization in light of the facts of this case: that Pharaon and BCCI intended to violate U.S. banking laws by deceiving U.S. banking regulators; that the Section 3 violation continued for more than five years; and that the Section 5 violations commenced, continued and grew during that same period. Accordingly, upon review of the evidence and the arguments of the parties, the Board rejects the exceptions of both parties to Judge Alprin's

recommendation for the amount of civil money penalties in this enforcement proceeding. The Board concurs with the Recommended Decision's recommendation of civil money penalties in this case in the amount of $37 million.

B. Order of Prohibition

Judge Alprin found that Pharaon, as an institution-affiliated party of BCCI, was subject to prohibition by the Board because the evidence established the statutory requirements for the imposition of an order of prohibition. RD at 128-130, citing 12 U.S.C. § 1818(e)(1). Specifically, Judge Alprin found: that Pharaon had violated the BHC Act and other laws and regulations; that Pharaon had participated in unsafe and unsound banking practices; that Pharaon's misconduct resulted in a loss to Independence Bank and potentially prejudiced the interests of its depositors; and that Pharaon's misconduct demonstrated his personal dishonesty and his willful and continuing disregard for the safety and soundness of Independence Bank. RD at 128-130. Pharaon excepts to these findings, asserting that: he did not commit an unlawful act; no loss to Independence Bank was shown; the evidence did not support the conclusion that depositors' interests could have been prejudiced; and Pharaon did not benefit from the alleged violation. PE at 174-178. The Board rejects all of these exceptions. The Board concurs in the Recommended Decision's findings as to each of the elements supporting the imposition of an order of prohibition. RD at 128-130.[11] Accordingly, the Board

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[11] The Board need not address Pharaon's "no benefit" argument, because the Board concurs in Judge Alprin's findings that the evidence establishes the alternative elements supporting the imposition of an order of prohibition: harm to

(continued...)

also concurs in the Recommended Decision's conclusion that imposition of an order of prohibition upon Pharaon is appropriate.

4. PHARAON'S CONSTITUTIONAL CLAIMS

Pharaon presses two principal constitutional challenges to this enforcement proceeding generally and to the imposition of civil money penalties in particular. First, Pharaon argues that the amount of civil money penalties imposed in the Recommended Decision violates the Eighth Amendment's Excessive Fines Clause. PE at 136. Second, Pharaon argues that the penalty amount is so large that it violates his Fifth Amendment substantive due process rights. PE at 172.

A. Eighth Amendment Excessive Fines Claim

Pharaon's primary arguments with respect to the Eighth Amendment rely upon cases under the Double Jeopardy Clause.[12] On that basis, Pharaon argues that the Board is required to determine whether the civil money penalty provisions in the BHC Act can be described as "solely remedial" in purpose. See PE at 133-134. However, the Supreme Court has recently clarified that whether a civil

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[11](...continued)
the institution, and potential prejudice to its depositors. 12 U.S.C. § 1818(e)(1)(B)(i)-(ii).

[12] Pharaon bases these arguments on a line of Supreme Court cases beginning with U.S. v. Halper, 490 U.S. 435 (1989), which set forth the circumstances under which a civil penalty may constitute "punishment" for purposes of the Double Jeopardy Clause's prohibition against multiple punishments for the same offense.

proceeding imposes "punishment" for Double Jeopardy Clause purposes is substantively and analytically distinct from other constitutional punishment analyses. U.S. v. Ursery, 116 S. Ct. 2135, 2147 (1996) ("Ursery"). Accordingly, Pharaon's argument that the Board must determine whether the civil money penalty provisions in the BHC Act are "solely remedial" is simply inapposite for an analysis under the Excessive Fines Clause.[13]

The only case Pharaon cites that is relevant to his Eighth Amendment Excessive Fines claim is Austin v. U.S., 509 U.S. 602 (1993) ("Austin"), where the Court held that an in rem civil forfeiture that is not solely remedial is reviewable under the Eighth Amendment's Excessive Fines Clause.[14] The Supreme Court has

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[13] "It is unnecessary in a case under the Excessive Fines Clause to inquire at a preliminary stage whether the civil sanction imposed in that particular case is totally inconsistent with any remedial goal. Because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive,' a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative of the excessiveness analysis that would follow." Ursery, 116 S. Ct. at 2146 (citations omitted).

[14] Even Austin is not squarely on point. In Austin, the petitioner had pleaded guilty to one count of possessing cocaine with intent to distribute. Based on that conviction, the United States subsequently filed an in rem action seeking forfeiture of petitioner's mobile home and auto body shop under 21 U.S.C. § 881. Id. at 604-605. Thus, Austin concerned whether an in rem civil forfeiture proceeding was subject to the Excessive Fines Clause. However, Ursery

(continued...)

expressly refused to establish a test for determining whether a forfeiture is constitutionally excessive. Austin, 509 U.S. at 622-623. "Prudence dictates that we allow the lower courts to consider that question [of establishing a multifactor test for determining constitutional excessiveness] in the first instance." Id.

The lower courts that have accepted Austin's invitation to craft such a test have rejected proportionality tests that simply compare the size of the penalty with the size of any actual damages or government loss. Instead, these decisions look to the nature of the conduct which gave rise to liability. "One way to consider what proportion of this award is excessive is to examine the nature of the conduct, rather than simply adopting a mathematical proportion." U.S. v. Gilbert Smith Realty Co., Inc., 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (emphasis added);[15] U.S. v.

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[14](...continued)
holds that in rem civil forfeiture proceedings are different in form and in substance from in personam civil penalty proceedings such as the instant administrative proceeding. "We acknowledged in Austin that our categorical approach under the Excessive Fines Clause was wholly distinct from the case-by-case approach of Halper [determining when a civil penalty may constitute punishment under the Double Jeopardy Clause]." Ursery, 116 S. Ct. at 2146.

[15] In Gilbert Smith Realty, the court found that the defendant had "violated the False Claims Act 58 times: by making 7 [false] statements to the local housing authority, and by endorsing 51 rent checks, each governed by a contract that stated an endorsement constitutes certification of non-receipt of additional rent beyond the amount allowed." Gilbert Smith Realty, 840 F. Supp. at 72. The

(continued...)

Advance Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995), aff'd, 86 F.3d 1159 (8th Cir. 1996).[16]

Pharaon's conduct constituting violations of Section 3 and Section 5 of the BHC Act was carried out and continued over a period of several years. As more fully described supra, Pharaon's violations of Section 3 and Section 5 of the BHC Act concealed from United States banking authorities the unauthorized control of a United States bank by an entity in direct contravention of the letter and purposes of the BHC Act. Pharaon's conduct giving rise to liability under the BHC Act was fully intentional, continuing and extremely serious. As set forth in the Recommended Decision, the total fine permitted under the

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[15](...continued)
District Court concluded that "defendants actually made seven certifications to the housing authority directly that were false claims in every sense of the word" and found that a penalty in the amount of $35,000 ($5,000 for each of the 7 false statements) was not excessive, but that imposing a $255,000 penalty based on the endorsement of each specific check would constitute an excessive fine. Id. at 75.

[16] In Advance Tool, the defendant was found liable under the False Claims Act for submitting 686 invoices to GSA which defendant knew to be false because defendant did not provide what the invoices purported to show had been delivered. Advance Tool, 902 F. Supp. at 1015-1016. The court looked to the substance of the conduct to determine the permissible amount of the penalty. "In the case at bar, [defendant] supplied GSA with 73 different types of tools [which were not as represented by the invoices]. The Court finds that a civil penalty of $5,000.00 per tool in the amount of $365,000 does not violate the Excessive Fines Clause." Id. at 1018-1019.

applicable statutes in this case, calculated at the statutory maximum for each day that each violation of the BHC Act continued, exceeds $111 million. RD at 106-109. Moreover, Judge Alprin considered a list of factors specified in the Interagency Policy, and concluded that this application would result in a penalty far in excess of the $37 million penalty recommended. For these reasons, the Board does not believe that Austin and its progeny require that the Board find that $37 million constitutes an excessive fine for Eighth Amendment purposes, given "the egregiousness of Pharaon's wilful, knowing, continuing violations engaged in with absolute disregard for accuracy of reports or for any consideration of the requirements of law." RD at 127, as corrected by "Corrections to Recommended Decision" (Apr. 15, 1996).

B. Substantive Due Process Claim

Relying upon BMW of North America v. Gore, 116 S. Ct. 1589 (1996) ("BMW"), Pharaon claims that "the penalty here is 'grossly out of proportion to the severity of the offense' and has entered the 'zone of arbitrariness that violates the due process clause[.]'" PE at 172 (citations omitted). In BMW, the Court found that a punitive damages award violated the Fourteenth Amendment Due Process Clause. BMW, 116 S. Ct. at 1592-1595, 1604. The statute giving rise to liability in BMW set forth no monetary standards for the imposition of punitive damages. Id. at 1603-1604.[17] As more fully discussed supra, the

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[17] In the absence of such standards, the Supreme Court in BMW looked to three factors in determining the reasonableness of a punitive damages award: "the degree of reprehensibility of the defendant's conduct" (id. at 1599 (footnote omitted)), the "ratio [of a punitive damages award]

(continued...)

civil money penalty provisions at issue in this case, in contrast, embody a considered congressional calibration of penalty to violation. Therefore, the Board finds no basis for Pharaon's reliance on BMW in this case and, accordingly, no violation of substantive due process.[18]

For all the foregoing reasons, the Board rejects all of Pharaon's constitutional attacks upon this enforcement proceeding and upon the amount of civil money penalties recommended therein.

5. PHARAON'S CHARGE OF BIAS AGAINST JUDGE ALPRIN

Pharaon argues that this enforcement proceeding violated his Fifth Amendment due process rights because it

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[17](...continued)
to the actual harm inflicted on the plaintiff" (id. at 1601), and "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . ." (id. at 1603).

[18] Finally, Pharaon also argues that this enforcement proceeding is "the functional equivalent of a criminal prosecution which the Board is unauthorized to conduct in any capacity . . . ." PE at 126. An identical argument was rejected by the District Court in Gilbert Smith Realty:

> The due process claim is procedural. Defendants argue that because the fine is essentially punishment, it requires the standards of a criminal jury trial to impose the fine. There is no support for this argument, and it loses.

Id. at 73.

"was fatally infected with Judge Alprin's bias against Pharaon." PE at 137. Pharaon bases this argument primarily upon a quotation from a section of Judge Alprin's disentitlement ruling on summary adjudication, which was subsequently reversed by the Board. To a lesser extent, Pharaon bases this argument on "the fact that Judge Alprin has ruled in favor of the agencies in all . . . the cases he has heard," and on Judge Alprin's rulings against Pharaon during the conduct of this enforcement proceeding. PE at 137-140.

The Supreme Court has stated that where a judge is alleged to be biased, the alleged bias and prejudice must stem from a source "outside the judicial proceeding at hand" to support disqualification on that ground. Liteky v. U.S., 114 S. Ct. 1147, 1152 (1994), citing U.S. v. Grinnell Corp., 384 U.S. 563, 583 (1966). The basis upon which Pharaon most strongly relies for his bias charge, however, is a quotation from a ruling in this case, i.e., part of the very judicial proceeding at hand.[19] This

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[19] The statement in question comes from Judge Alprin's recommendation on summary disposition: "Unless the Board considers as a matter of policy that it requires further graphic public display of oral testimony, and the presentation of mountains of supporting documentary exhibits, with the attendant costs, solely as to the involvement of Pharaon, there is no reason for a full oral hearing herein." Administrative Law Judge's Order Granting Summary Disposition Against Respondent from future participation in Federally Insured Depository Institutions and Imposing a Civil Money Penalty in the Sum of $37,000,000 (July 20, 1993) at 10. This statement on its face does not evince bias, but merely articulates one legal consequence of Judge Alprin's recommendation that Pharaon be disentitled, i.e.,

(continued...)

and Judge Alprin's other rulings against Pharaon during the course of this administrative proceeding cannot constitute the basis for a claim of judicial bias. Hansen v. C.I.R., 820 F.2d 1464, 1467 (9th Cir. 1987) (manner in which judge conducted trial, and judge's trial rulings adverse to defendant, did not violate defendant's due process rights to fair trial).

Similarly, Pharaon has failed to meet the heavy burden necessary to establish that Judge Alprin's prior rulings in favor of banking agencies constitute bias. McBeth v. Nissan Motor Corp. U.S.A., 921 F. Supp. 1473, 1478 (D.S.C. 1996), citing Liteky v. U.S., 114 S. Ct. 1147, 1158 (1994) (emphasis added) ("for any alleged bias arising out of this or prior proceedings, recusal is required only if a 'fair trial [for this particular party] is impossible'"). Accordingly, the Board finds that Pharaon's due process rights were not violated because of bias on the part of Judge Alprin.[20]

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[19](...continued)
that the Board need not hold a hearing if it adopted Judge Alprin's disentitlement recommendation. However, the Board "declined to invoke the doctrine of disentitlement" and remanded this case to Judge Alprin for trial. Decision on Recommendation of Summary Disposition (July 12, 1994) at 2.

[20] In any event, Pharaon's charge of bias is not timely under either the Administrative Procedure Act or the Board's Uniform Rules of Practice and Procedure. 5 U.S.C. § 556(b); 12 CFR § 263.39(b)(2). The Administrative Procedure Act "requires that such a claim [of bias on the part of the ALJ] be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification

(continued...)

6. DISCOVERY ISSUES

Pharaon claims that Board Enforcement Counsel's alleged failure to produce documents, including "Brady" documents and other documents relating to Pharaon, constitutes grounds for refusing to accept the Recommended Decision. PE at 140-142. However, a review of the transcript of the hearing in this matter shows that all Pharaon's discovery arguments were specifically considered and addressed during the hearing, except for Pharaon's argument that Board Enforcement Counsel's failure to disclose an alleged immunity agreement between Naqvi and the New York County District Attorney deprived Pharaon of a fair trial. PE at 140-142. The Board has considered this argument, and rejects it.[21]

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[20](...continued)
exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. The APA-mandated procedures [set forth in § 556(b)] afford every party ample opportunity to enforce and preserve its due process rights." Gibson v. F.T.C., 682 F.2d 554, 565 (5th Cir. 1982), quoting Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976). For example, assuming Judge Alprin's ruling on disentitlement constituted a proper ground for a charge of judicial bias, the time to raise such a claim was no later than the time this proceeding was remanded to Judge Alprin by the Board, not now.

[21] Assuming for purposes of argument that the evidence in question constitutes Brady material required to be disclosed, the Board finds that Pharaon has failed to (continued...)

Furthermore, in reversing Judge Alprin's recommendation of disentitlement on summary disposition and remanding this proceeding, the Board specifically authorized Judge Alprin "to use his plenary powers over the conduct of the proceedings to ensure that Pharaon's fugitivity does not disrupt this proceeding, and may invoke sanctions such as restrictions on discovery . . . ." Accordingly, the Board denies Pharaon's discovery exceptions.

7. MISCELLANEOUS

A. Judge Alprin's Credibility Determinations

Without actually basing exceptions on this issue, Pharaon argues that Judge Alprin incorrectly found Board Enforcement Counsel's main witnesses to be credible. PE at 115-122, 126. Judge Alprin specifically addressed the issue of witness credibility in the Recommended Decision, declining to "concur with the outmoded legal concept that falso in unis, falso in omnibus," and expressly finding that the Board Enforcement Counsel's two main witnesses were not inherently unreliable solely because they are convicted felons. RD at 82-85. Furthermore, Judge Alprin noted that the testimony of these witnesses was supported almost completely throughout by documentation. RD at 83. In addition, Judge Alprin noted that:

> The burden of initial proof by preponderance of the evidence was on [BEC] . . . . If there was any

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[21](...continued)
demonstrate that its nondisclosure was "material" and "deprived Pharaon's counsel of material information necessary to conduct cross-examinations of the Board's main witnesses" such that it "deprive[d] [Pharaon] of a fair trial." PE at 142.

> contrary testimony, in addition to that of Respondent, it was the responsibility of Respondent to produce it, and he failed to do so. If there were any documentation in refutation, much of which would perforce be in Respondent's possession rather than or in addition to that of [BEC], it was clear that Respondent would have been able to present it, with adequate explanation where required.

Id. Finally, the Board has previously held that credibility determinations are uniquely within the province of the administrative law judge as the trier of fact. In the Matter of Interamericas Investments, Ltd. and Peter Ulrich, 82 Fed. Res. Bull. 609, 615 (Apr. 9, 1996), and cases cited therein. Accordingly, the Board sees no basis for disturbing the administrative law judge's determinations as to credibility.

B. Request for Oral Argument

Finally, Pharaon in his Exceptions requested oral argument. Oral argument is a discretionary procedure. See 12 C.F.R. § 263.29(c). The Board finds that the arguments have been sufficiently presented in the pleadings before the Board. Therefore, the Board hereby denies the request for oral argument.

CONCLUSION

As more fully set forth supra, the Board hereby adopts the Recommended Decision, and accordingly further determines that:

- The exceptions of Pharaon to the Recommended Decision are denied;

- The exceptions of BEC to the Recommended Decision are denied; and

- The request of Pharaon for oral argument is denied.

So ordered, this [31st] day of [January], 1997.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

/s/
Jennifer Johnson
Deputy Secretary of the Board

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the matter of GHAITH R. PHARAON, Institution-Affiliated Party of BCCI Holdings (Luxembourg) S.A., Luxembourg, and the Bank of Credit and Commerce International S.A., (Luxembourg)	Docket Nos. 91-037-E-I1 91-037-CMP-I1

FINAL ORDER OF PROHIBITION AND ASSESSMENT OF CIVIL MONEY PENALTY

WHEREAS, the Board of Governors of the Federal Reserve System ("the Board") is of the opinion, for the reasons set forth in the accompanying Final Decision, that pursuant to Section 8(b) of the Bank Holding Company Act of 1956, as amended (the "BHC Act"), 12 U.S.C. § 1847(b), and pursuant to Section 8(e) of the Federal Deposit Insurance Act, as amended (the "FDI Act"), 12 U.S.C. § 1818(e), a final Order of Prohibition and Assessment of Civil Money Penalty in the amount of $37 million should issue against Respondent **GHAITH R. PHARAON** for violating the BHC Act and the Board's Regulation Y, 12 C.F.R. Part 225;

Now, therefore, it is hereby

ORDERED, that a civil money penalty in the sum of $37,000,000 be, and it is hereby assessed against **GHAITH R. PHARAON**, remittance of which must be

made forthwith, in immediately available funds payable to the order of the Secretary of the Board of Governors, who shall make remittance of the same to the Treasury of the United States; and it is further

ORDERED, that in the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to Section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e) (7) (B)), **GHAITH R. PHARAON** is hereby prohibited:

(1) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in subsection 8(e) (7) (A) of the FDI Act (12 U.S.C. § 1818(e) (7) (A));

(2) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subsection 8(e) (7)(A) of the FDI Act (12 U.S.C. § 1818(e) (7) (A));

(3) from violating any voting agreement previously approved by the appropriate Federal banking agency; or

(4) from voting for a director, or from serving or acting as an institution-affiliated party as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee; and it is further

ORDERED, that this Order shall become effective upon the expiration of thirty days after service hereof is made, and that each provision hereof shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

So ordered, this [31st] day of [January], 1997.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

/s/
Jennifer Johnson
Deputy Secretary of the Board

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of	)	
	)	
GHAITH R. PHARAON,	)	Docket Nos.
	)	91-037-E-I1
An Institution-Affiliated Party	)	91-037-CMP-I1
of BCCI Holdings (Luxembourg),	)	
S.A., Luxembourg, and the Bank	)	
of Credit and Commerce	)	
International, S.A. (Luxembourg)	)	

RECOMMENDED DECISION
(April 12, 1996)

Appearances of Enforcement Counsel,

Board of Governors of the Federal Reserve Board:
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Federal Reserve Bank of New York:
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Appearances on behalf of Ghaith R. Pharaon:

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Before: Walter J. Alprin
Administrative Law Judge
Office of Financial Institution Adjudication
Washington, D.C.

I. PRELIMINARY STATEMENT

This proceeding is a portion of what has been referred to as the "global" set of Notices encompassing a greater number of individuals and of institutions, and of other matters, global both in the description of magnitude as well as in the geographic sense. At the request of Enforcement Counsel, and over the objections of Respondent's counsel, this proceeding is limited to the allegations regarding the change in bank control over Independence Bank, of Encino, California. Ownership by Respondent in the National Bank of Georgia, and other matters, have been admitted into evidence as background and as a showing of Respondent's financial condition, and not to prove or disprove the occurrence of violations involving stock ownership or transfer of control.

II. STATEMENT OF THE CASE AND SUMMARY OF REDOMMENDATION

On September 13, 1991, Petitioner Board of Governors of the Federal Reserve System ("Board") filed its Notice of Assessment of a Civil Money Penalty issued pursuant to Section 8(b) of the Bank Holding Company Act of 1956 ("BHC Act"), as amended, and Amended Notice of Intent to Prohibit (the "Notices"), issued pursuant to Section 8(e) of the Federal Deposit Insurance Act ("FDIC Act"), as amended, 12 USC § 1818(e). The Notices allege that the Bank of Credit and Commerce International ("BCCI")[1] secretly acquired an 85% interest in Independence Bank, that BCCI violated Section 3(a) of the BHC Act, 12 U.S.C. 1842(a), by failing to seek Board approval prior to its acquisition of its interest in Independence Bank and thereafter violated Section 5(c) of the BHC Act by filing false and misleading periodic reports ("Y-7's") with the Board which failed to disclose BCCI's interest in Independence Bank. (Notice, ¶¶ 29-35). As to Respondent Ghaith R. Pharaon ("Pharaon"), the Board charges that he "caused, brought

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[1] In this memorandum, the term "BCCI" is used to refer to BCCI Holdings (Luxembourg), S.A., Luxembourg ("BCCI Holdings") and all of its related entities, including its subsidiary bank, the Bank of Credit and Commerce International, S.A., Luxembourg ("BCCI, S.A."), ICIC Holdings, its subsidiary bank, International Credit and Investment Company (Overseas) Limited, George Town, Cayman Islands ("ICIC Overseas"), ICIC Investments, Ltd. ("ICIC Investments") (also a subsidiary of ICIC Holdings), the ICIC Staff Benefit Trust and the ICIC Foundation. The relationship between these entities and the rationale for treating them collectively as "BCCI" is hereinafter discussed. Where a distinction among BCCI corporations is important, this decision refers to a specific BCCI entity.

about, participated in, or aided and abetted" BCCI's violations of its duty to seek prior approval from the Board by (a) agreeing to act as a nominee or agent for BCCI in the acquisition of Independence Bank and (b) making false statements in his "CBC Notice," filed pursuant to the Change in Bank Control Act, by asserting that he was acquiring 100% of Independence Bank. The Board further charges that Pharaon caused, brought about, participated in, or aided and abetted BCCI's false annual filings of Y-7's with the Board in that his secret agreement with BCCI to act as a nominee permitted BCCI to fail to disclose its alleged ownership of Independence Bank in the Y-7's. (Notice, ¶¶ 36-37).

The Board further alleges that because Pharaon (a) caused, brought about, participated in or aided and abetted BCCI's violations of the BHC Act; (b) filed a false and misleading CBC notice; and (c) is an institution-affiliated party of BCCI and is subject to an industry-wide prohibition order by the Board. (Id. ¶¶ 5, 39-41, 52). In addition, the Board charges that Pharaon's alleged violations of the BHC Act subject him to a civil money penalty, which the Board originally assessed at $37 million. (Notice, ¶¶ 53-56).

After extensive discovery and procedural practice,[2] hearing was held at New York, N.Y. between September 18, 1995, and October 18, 1995, inclusive. Times for filing Post-Hearing and Reply Briefs were extended upon motion, and filings were timely completed on January 26, 1996. This Recommended Decision may be summarized as finding

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[2] On July 20, 1993, the undersigned granted Enforcement Counsels' motion for and recommended the entry of summary disposition against Respondent based upon his disentitlement as a fugitive. On July 12, 1994, the Board declined to invoke disentitlement, and remanded the proceeding for hearing.

that Pharaon was an institution-affiliated party who violated Sections 3 and 5 of the BHC Act by assisting and participating with BCCI in its acquisition of unauthorized control of Independence Bank, of Encino, California, through acts of personal dishonesty. These acts also resulted in financial harm to a foreign bank with agencies in the United States, as well as to the Independence Bank.

It is herein found that the evidence supports, and the undersigned recommends entry of an order barring Pharaon from future participation in the conduct of the affairs of a federally insured depository institution, and assessment of a civil money penalty in the sum of $37 million.

III. FINDINGS OF FACT

A. BACKGROUND AND HISTORY OF BCCI

1. Organization

1. In 1972, Agha Hasan Abedi ("Abedi") incorporated BCCI, S.A. in Luxembourg. BCCI continued to maintain a banking presence in Luxembourg, but BCCI's center of operations was transferred to London, a location Abedi considered to be more conducive to its international banking activities. In 1974, Abedi reorganized BCCI, S.A., creating a holding company, BCCI Holdings, also incorporated in Luxembourg. TR at 90-92 (Naqvi).[3] At about the same

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[3] Citations to testimony and to documentary evidence is noted as follows:

TR at -- (---) provides the page number of the transcript and, in parenthesis, the identity of the witness testifying.

(continued...)

time, BCCI Holdings established a second subsidiary bank in the Cayman Islands, BCCI Overseas Limited. TR at 92-93 (Naqvi). By 1985, BCCI had operations in nearly 70 countries, including the United States, where both BCCI, S.A. and BCCI Overseas maintained agency offices. TR at 100, 108-109 (Naqvi). Although BCCI originally was little more than a consortium of its three principal shareholders, the Bank of America, the Ruler of Abu Dhabi and the Ruler of Dubai, Abedi intended BCCI's ownership to eventually pass to two trusts, the ICIC Foundation ("Foundation") and the ICIC Staff Benefit Trust ("Trust"). TR at 80-81 (Naqvi) The three original shareholders consented to Abedi's establishment of these entities. TR at 80-81 (Naqvi)

2. Abedi chartered the Foundation as a charitable organization under English law to make donations to worthy causes, and appointed a board of trustees which, in addition to himself, consisted of senior executives of BCCI, all of whom reported to him. The board took direction from Abedi, who effectively controlled this entity and, the Foundation's stated goals notwithstanding, ensured that its actions benefitted BCCI. TR 124-25, 128-29 (Naqvi)

3. Abedi established the Trust to provide benefits for employees of BCCI. The Trust shared a common board with the Foundation. As they did when sitting on the Foundation board, the Trust's board members took direction from Abedi,

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[3](...continued)

BoG Ex. -- provides the number of the exhibit offered by the Board of Governors.

R Ex. -- provides the number of the exhibit offered by the Respondent.

who ensured that the Trust's actions benefitted BCCI. TR at 125-29 (Naqvi).

4. Although the Foundation, the Trust and their affiliates (together "ICIC") were structured as distinct legal entities, Abedi operated them as part of a joint operation. Their offices were situated in the BCCI building at 100 Leadenhall Street in the financial district of London known as the City, and its employees took instructions from Abedi and Swaleh Naqvi ("Naqvi"). TR at 140-41 (Naqvi). Naqvi was the senior officer in charge of BCCI's Central Support Organization, characterized by him as BCCI's "brain", and was authorized by power of attorney to conduct business on behalf of both BCCI and ICIC. TR 107, 140-41 (Naqvi); BoG Ex. 1, at 4. The overall interest of BCCI, rather than any discrete interest of ICIC, guided Naqvi in issuing instructions to ICIC's employees. TR at 877-78 (Naqvi).

5. The Foundation and Trust beneficially owned ICIC Holdings, a Grand Cayman company, TR at 171 (Naqvi), and its subsidiaries, ICIC Overseas and ICIC Investments. Three BCCI officers held all of ICIC Holdings' shares in a fiduciary capacity for the Foundation and Trust. TR at 131 (Naqvi).[4] The Foundation and Trust each beneficially

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[4] Abedi's plan was to transfer the shares of ICIC Holdings to the ICIC Trusts, as shown in BOG Ex. 367, a memorandum concerning the ownership of ICIC Holdings, at ¶ 5 ("[W]e are holding in a fiduciary capacity . . . shares of ICIC Holdings"); ¶ 8 ("[I]t has been made clear at all stages that ourselves and our colleagues right from the . . . inception, wanted the benefit of our shareholdings of [ICIC] Holdings, to go to the [ICIC Foundation] and the [ICIC] Staff Benefit Trust"), ¶¶ 10-12 (describing the distribution of a dividend due to ICIC Holdings between the ICIC

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owned 50 percent of ICIC Holdings' shares. TR at 130-31 (Naqvi).

6. ICIC Holdings held two subsidiaries, ICIC Overseas and ICIC Investments. ICIC Overseas was also incorporated in the Grand Caymans, where it had a banking license. ICIC Investments engaged in portfolio management for BCCI's most wealthy clients, including Sheik Zayed, the Ruler of Abu Dhabi and his son, Sheik Khalifa, the Crown Prince. TR at 130-31 (Naqvi).

7. In addition to owning ICIC Holdings, the Foundation and Trust owned a large interest in BCCI Holdings. Each held shares in its own name, and, through ICIC Overseas, were the beneficial owners of additional shares held by nominees. TR at 122-23, 125 (Naqvi), BoG Ex. 553 at 2619. Together, the Foundation and Trust constituted BCCI Holdings' largest shareholder, controlling more than 25 percent of its shares. TR at 128 (Naqvi). To avoid what Naqvi termed as "regulatory problems," BCCI did not disclose this interrelationship of shareholders. TR at 123, 128 (Naqvi).

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[4](...continued)
Foundation and the ICIC Staff Benefit Trust).

Note that to the contrary, BoG Ex. 367 at ¶ 8, provides that the shareholders intended the benefit of their shareholdings of BCCI Holdings to go to the Foundation and Fund, rather than their shareholdings of ICIC Holdings. This may well be no more than a simple transcription error, in that the memorandum first describes these individuals' ownership interests in ICIC Holdings (¶ 4), the dividends ICIC Holdings will shortly receive (¶ 9) and the distribution of that dividend to the ICIC Trusts (¶ ¶ 11 and 12). It is of no importance to this matter whether or not this was in error.

8. Pharaon served as nominee for the shares of BCCI Holdings owned beneficially by the Foundation and the Trust. Using the proceeds of loans made in Pharaon's name, BCCI purchased BCCI Holdings' shares for the benefit of the Foundation and the Trust. TR at 122-24 (Naqvi). In November, 1984, Pharaon and ICIC Overseas signed an agreement describing the nominee relationship. TR at 148, 151-55 (Naqvi), BoG Ex. 24. According to this agreement, ICIC Overseas purchased shares of BCCI Holdings in Pharaon's name and financed these purchases through debits to a loan account, also in Pharaon's name. It was ICIC Overseas, the beneficial owner of half the stock, and not Pharaon, the titular nominee borrower and holder of the other half of the stock, that was responsible for repaying these loans. BoG Ex. 24 at ¶ 2. Approximately half of the shares of BCCI Holdings registered in Pharaon's name were actually held for the benefit of ICIC Overseas. TR at 119-122 (Naqvi), BoG Ex. 539 at ¶ 1 and Lists A and B, detailing the shares of BCCI Holdings Pharaon owned on behalf of ICIC and those he owned beneficially.

2. Pre-1984 change in financial condition

9. Prior to 1984, BCCI had accumulated undisclosed losses of more than $1 billion. TR at 73-74 (Naqvi). To survive, BCCI had concealed these losses from various bank supervisors around the world, including its primary regulator, the Institute Monetaire Luxembourg ("IML"), and from the Board in the United States. TR at 75-76 and 184-86 (Naqvi). These losses, which exceeded BCCI's stated capital of $800 million, TR 74 (Naqvi), arose primarily from two sources: unrecoverable loans to a number of borrowers controlled by the Gokal shipping family ("Gokal loans"), and losses that the treasury of BCCI's Cayman-based bank sustained in trading its own portfolio. TR at 74 (Naqvi). In order to protect this major borrower's financial condition, and because of its longstanding relationship with the Gokal

family, BCCI had extended an enormous amount of credit through the Gokal loans in contravention of its own internal policy on loan concentration. TR at 205-6 (Naqvi). The Gokal loans alone generated undeclared losses of approximately $400 million, TR at 205 (Naqvi), and the losses in BCCI's private treasury accounts exacerbated its fiscal problems. Further, a large but incorrect position that BCCI's treasury personnel had taken in the futures market generated a loss of approximately $300 million. TR at 205 (Naqvi).

10. BCCI concealed these losses in various ways. It embezzled the investment accounts of the Ruler of Abu Dhabi, one of its wealthiest customers, and it utilized the proceeds of fictitious loans to disguise the non-performing Gokal loans. TR at 1,228 (Naqvi). Further, Abedi arranged for a "gift" of $159 million to BCCI from the Trust. TR at 79-80, 115 (Naqvi); BoG Ex. 553 at 2611. The Trust raised this sum by selling its BCCI Holdings shares to the al Maktoum family, rulers of the Emirate of Dubai. TR at 115-16 (Naqvi).

11. Abedi assigned Naqvi the task of managing the losses until there were sufficient funds from other sources to cover them, TR at 184-85 (Naqvi), hoping that he could recoup the moneys through normal banking activity, and through "extraordinary" profits. TR at 187 (Naqvi). Some of this "extraordinary profit" was to be achieved through secret stock investments by BCCI in high-growth corporations through nominees. TR at 187 (Naqvi). BCCI made such investments in several companies through joint ventures with Pharaon. Pharaon acquired 85 percent of the shares of Attock Oil, which owned valuable oil rights in Pakistan, through a holding company, Finance Investment

International Limited ("FIIL").[5] Of the purported 85 percent ownership by Pharaon, Pharaon actually held only 15 percent as beneficial owner and held the remaining 70 percent as nominee for BCCI. TR at 189-90 (Naqvi), BoG Exs. 3 and 380. Funding for the acquisition was provided by non-recourse loans from BCCI to Pharaon. TR at 236 (Naqvi), BoG Ex. 487 at 2,307. The total loans to Pharaon for this purpose totalled more than $25 million. TR at 238-39 (Naqvi). BCCI also used Pharaon as a nominee to invest as beneficial owner of 50 percent of the National Bank of Georgia, of Atlanta, Georgia, while Pharaon acquired the remaining 50 percent interest in NBG for himself as actual owner. TR 173-80 (Naqvi).[6]

12. Though some of these investments generated large profits for BCCI and Pharaon, BCCI's profits still were insufficient to offset its losses. As of year-end 1984, BCCI had not replenished its capital base. TR at 74, 77 (Naqvi).

3. Basle Concordat and BCCI'S need to change home country supervisor

13. In 1975, a multinational committee of bank supervisors headquartered in Basle, Switzerland, issued a set of principles, now known as the "Concordat," revised and updated in 1983, governing the supervision of financial organizations engaged in international banking. TR at 70-72, 1,632 (Naqvi); BoG Ex. 611. The Concordat divides responsibility for the supervision of international financial

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[5] These entities not being banking institutions, there are no allegations that this transaction was a violation charged herein.

[6] As noted above, this transaction is not litigated in this proceeding.

organizations between the country where an institution is chartered, referred to as the "home" country, and any country where an institution conducts business, referred to as a "host" country. TR at 70-71 (Naqvi). The home country bears responsibility for supervising the worldwide activities of an international bank, while the host country supervises the activity of the institution within its own borders and, additionally, seeks to assure that the home country is fulfilling its duty of worldwide supervision. TR at 1,737-39 (Fields); BoG Ex. 611 at 3-5.

14. After the 1983 revisions to the Concordat, Luxembourg, where both BCCI Holdings and BCCI, S.A. were chartered, notified BCCI that it would in the future be unwilling to serve as BCCI's home country supervisor. BCCI was thus obligated to find an alternative home country that could provide BCCI with "comprehensive and consolidated supervision," as required by the Concordat. TR at 71-73, 363-64 (Naqvi). Abedi and Naqvi recognized that few countries could credibly claim to provide comprehensive supervision for an organization conducting business in more than 70 nations. They considered that their options included relocating BCCI to the United Kingdom, where it already had significant operations, to the United States, or to both countries. TR at 364-66 (Naqvi). BCCI's United Kingdom business was limited to that of a "licensed deposit-taker," which was inferior to being a commercial bank, as a consequence of which it would be difficult to obtain a full banking license in the United Kingdom. TR at 394-95 (Naqvi). BCCI therefore decided to focus its attention on entering the United States. TR at 394-96 (Naqvi); BoG Ex. 554A at 5.

15. The Luxembourg regulators pressed Abedi and Naqvi to resolve the situation quickly. TR at 304-5, 392 (Naqvi); BoG Ex.589. Abedi engaged Clifford & Warnke, a United States law firm, to advise BCCI on how best to

transfer its supervision to the United States banking regulators. In meetings with the firm, Abedi set out his rationale for restructuring BCCI. He wanted BCCI to maintain a presence in the United Kingdom, but transfer its base of operations to the United States. Specifically, Abedi wished BCCI to come under the jurisdiction of the Federal Reserve Board. TR at 390-6 (Naqvi).

16. In September of 1984, Clifford & Warnke prepared a detailed memorandum for Abedi outlining five alternative proposals. TR at 397 (Naqvi); BoG Ex. 554A. After discussions with Naqvi and Abedi, the law firm offered a recommendation that BCCI adopted as its strategic plan. TR at 406-10 (Naqvi); BoG Ex. 553A. Since the law firm was aware of BCCI's fiscal constraints, they recommended that BCCI acquire an existing bank in the United States of modest size, with assets of $100 to $200 million. TR at 411 (Naqvi); BoG Ex. 554A at 0024-25. This bank could then subsequently be merged into BCCI, S.A., thereby converting BCCI Holdings into a bank holding company under United States law, subject to the supervision of the Federal Reserve. TR at 410-13 (Naqvi); BoG Ex. 553A at 003. In order to obtain a second opinion, Amer Lodhi, an attorney at BCCI, retained the law firm of White and Case, which offered BCCI substantially similar advice. TR at 1,462 (Lodhi); BoG Ex. 579.

17. BCCI targeted banks with an asset base of between $100 and $200 million. TR at 1,622 (Naqvi). To fit within BCCI's existing operations, the bank needed to be located in a metropolitan area. TR at 381-82 (Naqvi), 2,235-36 (Helmy); BoG Ex. 8 at ¶ 1. To avoid further financial troubles, the ideal target bank would be well-managed and have a sound loan portfolio. TR at 1,674-77 (Fields).

B. ACQUIRING INDEPENDENCE BANK

1. Identifying the target

18. After making the decision based upon the advice of Clifford & Warnke and of White & Case in late 1984, Abedi initiated efforts to identify a specific bank to be acquired in the United States, directing BCCI's senior officers in the United States to seek out possible acquisition targets. TR at 419-20 (Naqvi). Naqvi directed Abedi's assistant, Imran Imam ("Imam"), who also served as Pharaon's account officer, to maintain an "American Bank Proposals" file, into which Imam placed the written acquisition proposals and bank evaluations received from various sources. TR at 377-78 (Naqvi).

19. Abol Helmy ("Helmy"), an accountant by background and one of BCCI's two-man team stationed in New York working on mergers and acquisitions in Latin America, was one of the BCCI officers searching for a target bank. TR at 1,416-17 (Lodhi). In August, 1983, at Naqvi's direction, Helmy reviewed the Central Bank of California to determine whether it would be a suitable acquisition target, TR at 381-82 (Naqvi) and 2,236 (Helmy), and in September of 1983 he analyzed the Great American Bank of Los Angeles, California for the same purpose, again at Naqvi's direction. TR at 373-74 (Naqvi) and 2,239 (Helmy). Helmy reported that neither bank met BCCI's requirements and recommended that BCCI not proceed with an acquisition. TR at 381-82, 374 (Naqvi) and 2,236, 2,239 (Helmy); BoG Ex. 11.

20. In February of 1984, Helmy retained Henry Fields ("Fields"), an attorney with the firm of Morrison and Foerster, at their San Francisco office, to assist BCCI with this effort. TR at 1,673-74 (Fields). Helmy had met Fields before coming to BCCI, while working for the accounting

firm of Coopers & Lybrand in Los Angeles. TR at 2,003 (Fields). Together, Helmy and Fields examined several possible acquisition targets, Helmy on the understanding it was for BCCI and Fields understanding that it was for purchase by one or more BCCI shareholder-customers. TR at 382 (Naqvi), 2,253-54 (Helmy), and 1,673-74 and 1,676 (Fields). Fields developed a list of potential target banks that he believed would satisfy the strategic requirements as outlined for him by Helmy. TR at 1,675-76 (Fields). Fields searched for a bank that could be purchased for approximately $20 million, roughly corresponding to an asset base of $200 million, TR at 1,860-61 (Fields), that had good management and a solid loan portfolio, that had an international banking department, and that was located in a metropolitan area. TR at 1,674-75 (Fields). Based upon these factors, Fields developed his "short" list of potential takeover candidates which included the Santa Monica Bank and the First Business Bank. TR at 1,676 (Fields), 2,237-38 (Helmy).

21. While Fields stated that he was at that time unaware of the identity of the proposed purchases, Helmy approached the Santa Monica Bank's chairman stating that he was acting on behalf of Pharaon. TR at 2240-2241 (Helmy). Although the Santa Monica Bank inquiry did not come to fruition, Helmy and Fields continued to identify banks in Los Angeles purportedly for purchase by Pharaon. TR at 2243, 2253-2255 (Helmy); TR at 1,682 (Fields). In addition to Helmy's reports, BCCI received a letter from a law firm indicating that the Toronto Dominion Bank of California, with assets of $152 million, was for sale, but Naqvi rejected the possibility. TR at 378-80 (Naqvi); BoG Ex. 9.

22. The manager of BCCI's Miami office suggested the City National Bank of Miami as a target, but with assets of approximately $500 million it was a larger bank than Abedi had specified. TR at 377 (Naqvi); BoG Ex. 10.

23. Louis Saubolle ("Saubolle"), the head of BCCI's Western Region, TR at 2,455 (Saubolle), brought forward the name of Independence Bank. Between January and April, 1984, Abedi had met with Saubolle three times in BCCI's Los Angeles office. During one of these meetings, the manager of BCCI's Los Angeles agency complained to Abedi about the restrictions on his ability to take deposits in the United States, which he stated resulted in BCCI's inability to serve its customers' needs. The agency manager indicated that Independence, located immediately across the street from the Los Angeles agency, possessed a full banking license, could take deposits, and might be for sale. Abedi directed Saubolle to investigate the possibility of acquiring Independence Bank, and Saubolle contacted its owners, who resided in Hong Kong, through connections he had developed during his earlier service as a banker in Hong Kong. TR at 2,456-57, 2,485 (Saubolle).

24. Saubolle arranged to meet with the Chinese owners in August, 1984 and had preliminary discussions concerning BCCI's purchase of Independence Bank. TR at 2,485 (Saubolle). He instructed an employee of BCCI's Western Regional Office to undertake a preliminary analysis of Independence's financial condition. TR at 2,460 (Saubolle). The employee did so, summarizing his findings in a report based upon which, and his discussions with Independence Bank's owners, Saubolle wrote to Abedi recommending that BCCI acquire Independence Bank. TR at 2,460-61; BoG Exs. 376, 388, 18A.

25. Independence satisfied BCCI's criteria for a United States bank in terms of transferring its home country supervisor to the Federal Reserve Board. It was chartered by the State of California, had branches throughout the Los Angeles area and had assets of just over $200 million. TR at 1,744-45 (Fields), 2,244 (Helmy), 520 (Naqvi); BoG Ex. 584 at 3,200. According to Saubolle's letter, which is a

contemporaneous record of the considerations motivating BCCI, the acquisition of Independence Bank "would be a good acquisition for BCCI, in terms of size, clean loan portfolio, liquidity, senior management team of capable and experienced officers, and good growth potential." TR at 1,222-26 (Naqvi); BoG Ex. 18A. Saubolle believed that Independence Bank's full-service banking license would allow BCCI "much required freedom for . . . future growth. . . . " and concluded that the acquisition of Independence Bank would mesh with "the BCCI plan for acquiring a well managed conservative financial institution on the West Coast of the U.S.A." BoG Ex. 388 at 4. After receiving Saubolle's letter of recommendation and discussing it with Naqvi, Abedi authorized Saubolle to proceed with the acquisition. TR at 429-30 (Naqvi). There appears to have been no doubt in Saubolle's mind that the entity proposed to acquire the purchased bank was to be BCCI.

26. By the end of November 1984, Kemal Shoaib, a General Manager of BCCI in charge of BCCI's U.S. operations, contacted Helmy and informed him that Independence Bank had been identified by Saubolle as a good bank acquisition. TR at 2243-2244 (Helmy). This was the point at which Lodhi became involved in the acquisition. TR at 2245 (Helmy). Lodhi was an English-trained lawyer who had come to BCCI in 1983 from the law firm White & Case and had been involved primarily in mergers and acquisitions work. TR at 1417 (Lodhi). Along with his work for BCCI, Lodhi had been "on loan" to Pharaon to work on the restructuring of Redec, a nonbanking organization and one of Pharaon's companies. TR at 1420-1421 (Lodhi), TR at 449-450, 1310 (Naqvi). Shoaib told Lodhi that Independence Bank was the bank BCCI had been trying to locate for Pharaon in BCCI's capacity as investment banker. TR at 1418-1419 (Lodhi).

2. Identifying the nominee purchaser

27. As shown above, BCCI was now in serious financial difficulties and had decided to seek extraordinary profits from banking operations. Further, it was also required to change its home country banking regulator, had determined that the Federal Reserve Board in the United States was its choice, and that it would be required to establish a bank ownership in that venue. However, had the application process for bank ownership in the United States been submitted at that point, the risk of discovery of BCCI's true financial condition during the review process would not only have resulted in rejection but would also have intolerable adverse effects on other BCCI operations. TR at 146-47, 434, 1293, 1,305 (Naqvi).

28. BCCI had acted as an investment banker for many years, a role that included "portfolio management" for clients who wanted to purchase such assets as banks or real estate. TR at 1309 (Naqvi); TR at 1442 (Lodhi); TR at 2482, 2487 (Saubolle). BCCI encouraged its officers to refer investment opportunities to the London headquarters that might be of interest to its prominent shareholders and customers. TR at 2487, 2495-2496 (Saubolle). By 1984, Pharaon had participated in investments in several banks in the United States and had been looking for a bank in the Southwest since the early 1980's. TR at 1444 (Lodhi); GRP Ex. 181-184.

29. After discussing the matter with Naqvi, Abedi decided to proceed with an indirect acquisition of Independence Bank, using Pharaon as a nominee. TR at 434, 1,305 (Naqvi). The selection of Pharaon was in consideration of his reputation as a sophisticated and successful businessman, experienced in acquiring existing businesses. TR at 165-67 (Naqvi). He was already acting as nominee for BCCI's investments in Attock Oil, NBG, and BCCI

Holdings. TR at 437-38 (Naqvi). In acquiring NBG, Pharaon had already received approvals similar to those required to purchase Independence Bank, and his significant wealth would support the concept of his personal ownership of an acquired bank, making subsequent approval highly probable. TR at 437-46 (Naqvi), 3,138 (Michaels). Having been educated in the United States and owning an extensive residential and office estate in Georgia, Pharaon's ties with this country made it highly probable that his applications, rather than that of other individuals associated with BCCI, would be approved by the Board.

30. Pharaon's business affairs were already connected to and with those of BCCI. In addition to serving as nominee for BCCI's purchase of shares in BCCI Holdings, Pharaon purchased shares for himself. He had paid $31.2 million for the shares of BCCI Holdings which he owned beneficially, and which he then sold through BCCI for $95 million. TR at 1,608-609 (Naqvi). From this investment, Pharaon gained a profit of $63.3 million, partially as compensation for his services as nominee. Acting as BCCI's nominee also enabled Pharaon to purchase 50 percent of the shares of NBG for his own benefit. TR at 1,644-45 (Naqvi). The cost for all of NBG's shares was $22.9 million, and Pharaon sold the 50 percent interest he owned beneficially for $102.5 million, a profit of $91 million on this investment. TR at 180-82, 1,644-45 (Naqvi); BoG Ex. 539 at 2,417. These two investments alone provided Pharaon with a profit of $154.3 million. There is no indication that BCCI had any motive to offer these opportunities other than as compensation for Pharaon's services as nominee, and were to be indicative of future opportunities to be offered to Pharaon by BCCI. As testified to Naqvi:

> The enormous profit on those investments made and the facilities which were extended to Dr. Pharaon by BCCI on short notice, the "A" category facilities

(non-recourse loans), no other bank would be willing to allow that kind of facilities unless there was a major overall relationship, sir.

TR at 1,644-45 (Naqvi), parenthetical material added.

31. In additional benefits, BCCI granted Pharaon $300 to $350 million in credit. TR at 207 (Naqvi). BCCI was willing to accommodate Pharaon's financial needs quickly, without resort to the laborious due diligence procedures required in most banks. TR at 1,644-45 (Naqvi). Occasionally, BCCI would even arrange for credit to Pharaon in excess of his large credit limit by engaging in a financing technique referred to by Abedi as one method through which BCCI's extensive losses were to be recovered, as a "triangular placement." These arrangements were maneuvers in which assets were transferred quickly from one BCCI entity and location to another in order to mask the realities

of the loans.[7] Pharaon could not have received similar treatment elsewhere. TR at 1,644-45 (Naqvi).

32. Pharaon was aware of BCCI's operations and actively participated in them, TR at 1,644-45 (Naqvi), and in addition asked for and received from BCCI annual written confirmations that he would not be held liable on the non-recourse loans used to acquire the nominee shares.

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[7] TR at 208-16 [Naqvi], that a triangular placement is a scheme used to circumvent restrictions of safety and soundness upon a bank's exposure to a single borrower. A lending bank ("Lending Bank") that wishes to make a loan to a borrower in excess of such a limit arranges for the borrower to receive a loan from a second bank ("Funded Bank"). At the same time, the Lending Bank places a deposit with the Funded Bank in the same amount as the arranged borrowing. The Funded Bank uses this deposit to fund the loan to the borrower and to secure the repayment of the arranged loan. The Lending Bank has traded one asset on its balance sheet, a "due from borrower," for a second asset, a "due from Funded Bank." The Funded Bank's security interest in the Lending Bank's deposit is not revealed to either the Funded Bank's or the Lending Bank's auditors. This enables the Lending Bank to arrange a loan that it could not make itself and creates the appearance of reduced exposure to the borrower. Because the Funded Bank will utilize the Lending Bank's deposit to offset any loss on the loan extended to the borrower, the Lending Bank, in actuality, has not reduced its credit exposure to the borrower. In less sophisticated terms, it is a common shell game in which the pea, if one exists at all, is expertly palmed by the manipulator of the shells, precluding a spectator from locating it at its supposed location under one of the shells.

Pharaon signed letters from BCCI's auditors confirming the balances in the non-recourse loan accounts.[8]

3. Negotiating the agreements

33. In November, 1984, Abedi informed Saubolle that Pharaon, rather than BCCI, would purchase Independence Bank. TR at 429 (Naqvi), 2,466 (Saubolle). Saubolle contacted Independence Bank's Chinese owners and informed them that BCCI represented an individual interested in purchasing Independence. TR at 2,054 (Chan). Saubolle engaged the law firm of Rosenblum, Parish & Bacigalupi ("Rosenblum, Parish"), which represented BCCI's Western Regional Office, to prepare a letter of intent. TR at 2,466 (Saubolle). Rosenblum, Parish prepared the letter and Saubolle executed it, ostensibly on Pharaon's behalf. TR at 2,466-67 (Saubolle). Saubolle included a $23 million purchase price in the letter without consulting Pharaon, the individual who would supposedly pay it. TR at 2,467 (Saubolle). Shoaib, a senior BCCI officer, had negotiated the price, with Abedi providing the final approval. TR at 1,317-19 (Naqvi). The owners of Independence Bank had likewise not communicated with Pharaon. TR at 2,056 (Chan).

34. After completing the letter of intent, Saubolle proceeded with the acquisition process. Rosenblum, Parish began the legal "due diligence" in December, 1984. TR at 2,058 (Chan). Early in 1985, a team of individuals from BCCI, led by Imtiaz Ahmed, head of BCCI's Central Credit Division, arrived in California to review Independence Bank's loan portfolio. TR at 447 (Naqvi).

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[8] See, infra, as to Non-Recourse Arrangements, and "letters of comfort" from banks.

35. Shoaib thereafter telephoned Saubolle and informed him that he, and not Saubolle, would oversee the Independence purchase. Shoaib stated that Helmy, as well as Lodhi, the BCCI attorney working with Helmy in New York, would temporarily relocate to Los Angeles for this purpose. TR at 2,468-69 (Saubolle). He also told Saubolle that the law firm of Morrison & Foerster, and specifically Mr. Fields, would represent Pharaon in the transaction. TR at 2,470 (Saubolle). Having already begun the acquisition process and having hired Rosenblum, Parish for this purpose, these developments embarrassed and frustrated Saubolle. TR at 2,469-70 (Saubolle).

36. Based on Helmy's statements, Fields understood that BCCI would serve as investment advisor to the ultimate purchaser of the target bank. TR at 1,666-67, 1669 (Fields). While working with Helmy in identifying possible acquisition targets, Fields had requested that he represent the eventual purchaser of the bank, rather than the purchaser's purported investment advisor. Helmy told Fields that he, Fields, would become Pharaon's counsel. TR at 1,666-67, 1,689 (Fields). Neither Helmy nor Fields, however, had any contact with Pharaon, the purported "client," about the representation or any other matter, before this had occurred. TR at 2,243, 2,246-47 (Helmy). Helmy was never authorized to retain Fields, and could only have done so at the direction of BCCI.

37. One of Fields' first tasks purportedly as Pharaon's counsel was the preparation of an investment advisory agreement between Pharaon and BCCI. TR at 1,694-98 (Fields). Through this agreement, BCCI committed to identify a bank in California suitable for Pharaon to purchase. BoG Ex. 17 at ¶ 1. Although prepared in January, 1985, Fields back-dated the agreement to August, 1984, TR at 454 (Naqvi), 1,698 (Fields); BoG Ex. 17 at 3,320, the time at which BCCI had begun the search to purchase for

itself a bank as recommended by Clifford and Warnke as part of the program to make the Federal Reserve Board the "home country" supervisor. The backdating explained BCCI's earlier role on its own behalf in locating Independence, which occurred well before Pharaon was publicly declared to be Independence Bank's putative sole purchaser, and in order to allocate Fields' fees for the period not to BCCI, but to Pharaon. TR at 451 (Naqvi), 1,698 (Fields). Prior to executing the investment advisory agreement, BCCI had never provided investment advice to a client on a United States banking acquisition. TR at 451-52 (Naqvi).

38. Helmy, Lodhi and Shoaib explained BCCI's role as investment advisor to Fields so that he could draft the agreement. TR at 1,690, 1,695, 1,697-98 (Fields). Fields had no contact with Pharaon while preparing this document, although it obligated Pharaon to pay BCCI $25,000 annually in perpetuity, one percent of the purchase price of Independence Bank ($230,000), and $50,000 annually for BCCI's monitoring of Independence Bank. BoG Ex. 17 at ¶ 5. Fields did not discuss these fees with Pharaon nor did he negotiate them with BCCI on Pharaon's behalf. TR at 1,696-98 (Fields). Instead, Fields relied on representations by BCCI employees that Pharaon had already accepted the terms. TR at 1,695 (Fields). The reality was that BCCI had no need to discuss these fees with Pharaon, as they were a sham. TR at 455-57 1,313-15 (Naqvi). BCCI did not provide Pharaon with most of the services the agreement outlined, TR at 1,313-15 (Naqvi), and Pharaon never paid the fees, or other costs contemplated by the agreement, TR at 457-58 (Naqvi), so that there was no need to have negotiated them.

39. After completing the back-dated investment advisory agreement, BCCI's Independence-acquisition team turned to the preparation of the stock purchase agreement, and

negotiated the agreement's terms, purportedly on Pharaon's behalf, with the sellers of Independence. TR at 1,432-33 (Lodhi), 1,703-04 (Fields). The stock purchase agreement contained all of the material and legally binding terms for the acquisition, including the purchase price, the seller's obligation to guarantee the bank's assets, and the seller's representations and warranties. TR at 1,715-30 (Fields); BoG Ex. 40 at 197. Although this agreement obligated Pharaon legally, Fields neither met with Pharaon, nor communicated directly with him in any manner whatsoever before the agreement's execution, relying exclusively on the information provided him by Lodhi and Helmy. TR 1,703-05 (Fields). Helmy, however, never spoke to Pharaon. TR at 2,243, 2,246-47 (Helmy). As to Lodhi, though he and Pharaon frequently met, they never discussed the substance of the Independence acquisition. TR at 1,432, 1,406-47 (Lodhi). Lodhi explained that Naqvi had warned him not to mention the substance of the Independence acquisition to Pharaon. Thus, the only persons who could verify Pharaon's participation in the agreement are Pharaon, who did not participate in the hearing, Abedi, who was deceased, and Naqvi, who's testimony was that Pharaon had not participated.

40. Though in Los Angeles at the time, Pharaon did not attend the signing of the stock purchase agreement, which occurred in April of 1985. Lodhi and Saubolle initialed it purportedly on Pharaon's behalf pursuant to a power of attorney. TR at 2,471-72 (Saubolle), 1,431-32 (Lodhi). In June 1985, again pursuant to a power of attorney, Saubolle and Lodhi executed an amendment to the stock purchase agreement, BoG Ex. 45, through which the sellers agreed to place an additional $3 million of the purchase price in escrow. Saubolle did not discuss this power of attorney with Pharaon or the conditions under which he could exercise it. TR at 2471-72 (Saubolle). He learned from Lodhi and Shoaib that he had been granted this authority, and was

directed by them not to exercise it without their specific approval. TR at 2,471-72 (Saubolle).

C. THE ACQUISITION AGREEMENT

41. Lodhi and Saubolle executed the stock purchase agreement on April 30, 1985, and in May of 1985, Pharaon and BCCI, through Naqvi on behalf of ICIC Overseas, drafted their plan for acquiring Independence Bank by a document entitled "Acquisition of the Shares of Independence [sic] Bank" (the "Acquisition Agreement").[9] TR at 483-503 (Naqvi); BoG Ex. 37. The Acquisition Agreement called for Pharaon to become the registered owner of 100 percent of Independence Bank's shares. He was, however, to beneficially own only 15 percent of these shares, the remaining 85 percent to be beneficially owned by ICIC Overseas though held in Pharaon's name. TR at 496-97 (Naqvi); BoG Ex. 37 at ¶ 2. ICIC Overseas was to arrange the financing required for the share purchase. TR at 499-500 (Naqvi); BoG Ex. 37 at ¶ 5. The Acquisition Agreement entitled ICIC Overseas to any dividends or rights shares issued on its 85 percent of Independence's shares, allowed ICIC Overseas to possess Independence Bank's share certificates, and prohibited Pharaon from disposing of the shares owned by ICIC Overseas. BoG Ex. 37 at ¶¶ 5-7 and 10.

42. BCCI intended the Acquisition Agreement to ensure that Pharaon clearly understood that BCCI was the beneficial

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[9] Enforcement Counsels' briefs refer to this document as the "Nominee Agreement." The undersigned prefers to use the directly descriptive title of "Acquisition Agreement," and let the facts speak for themselves to support the conclusion that by its terms Pharaon was acting as a nominee for stock beneficially owned by BCCI through ICIC.

owner of 85 percent of Independence Bank's shares, so that the shares of Independence would be available when it was ready to implement its restructuring plan. TR at 497-98, 1,572-73 (Naqvi). When this time came, BCCI intended to become the registered owner of at least 85 percent of Independence's shares and would "purchase" Independence Bank's shares from Pharaon through ICIC Overseas. TR at 497-98, 1,572-73 (Naqvi). BCCI would "pay" the purchase price by discharging the loans made in Pharaon's name, originally used to acquire 85% of Independence Bank's shares, and BCCI would apply for the necessary regulatory approvals at this time. TR at 497-98, 1,572-73 (Naqvi).[10]

43. Pharaon and BCCI never intended the Acquisition Agreement, which included spaces for details to be inserted, to be a legally enforceable contract, which might become the subject of a dispute between the parties in a court of law. TR at 483, 756 (Naqvi). It could not have been, as both Naqvi and Pharaon, the signatories, knew that the agreement violated United States law and intended to keep it secret. TR at 501-504 (Naqvi). The agreement constituted a written and executed restatement of the plan by BCCI, with Pharaon, by which Independence Bank would be covertly acquired by BCCI without approval by the Federal Reserve Board through Pharaon's participation. TR at 483, 756 (Naqvi).

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[10] Pharaon's Post-Hearing brief argues that such a supposed plan is preposterous, in that it would posit BCCI coming forward at this later date to confess serious violations at the same time that it was seeking approval for the change in bank control. The argument is specious, in that given BCCI's proven propensity for concocting alternative scenarios based upon false statements and undisclosed agreements, in which Pharaon participated, it does not require any leap of the imagination to understand that BCCI would make its application without any admission of prior impropriety.

44. Pharaon executed the Acquisition Agreement, which constituted the intention of the parties in May, 1985. It was never rescinded, TR at 492-93 (Naqvi), though it was briefly modified, as discussed below. Neither BCCI nor Pharaon disclosed the Acquisition Agreement to the banking regulators of the United States, TR at 504 (Naqvi), as both sides appreciated the importance of concealing its existence. TR at 501-3 (Naqvi). Naqvi did not disclose the Acquisition Agreement to Shoaib, Lodhi or Helmy, the BCCI employees involved in the Independence purchase with the unsupported preconception that Pharaon was the true purchaser. TR 504 (Naqvi). Similarly, when Pharaon met Fields in June of 1985, days after signing it, he did not disclose the Acquisition Agreement to him, even though Fields supposedly represented Pharaon's interests and was preparing the regulatory applications required to proceed with the Independence acquisition. TR at 1,904-5 (Fields).

45. BCCI and Pharaon orally modified the Acquisition Agreement, but restored their original understanding several weeks later. In the spring of 1986, more than six months after the Independence Bank purchase closed, Pharaon met with Abedi and Naqvi in Nice, France, to discuss the sale price for NBG. TR at 744-45 (Naqvi). After agreeing to sell NBG to Credit and Commerce American Holdings ("CCAH") for $220 million, earning Pharaon a profit of $91 million, Pharaon was eager to increase, without actual expense, his beneficial interest in the stock of this second United States bank to be obtained from BCCI. Pharaon asked to modify the Acquisition Agreement to increase his beneficial interest in Independence Bank from 15 percent to 50 percent, to which Abedi reluctantly agreed. TR at 180-82 (Naqvi). Though neither Pharaon nor BCCI could at that point admit their secret scheme for BCCI to retain an undisclosed controlling interest in Independence, the issue was more vital to BCCI which sought an eventual disclosed

ownership for purposes of home country supervision by the Federal Reserve Board.

46. Pharaon changed his mind shortly thereafter. In June of 1986, having learned that Independence Bank would require additional capital infusions, Pharaon wrote to Naqvi and asked that the allocation of Independence Bank shares be restored to his original subordinate position. TR at 754 (Naqvi); BoG Ex. 580. In this handwritten letter, Pharaon referenced his difficulty in raising cash and his need to restructure the debt of one of his corporations, Redec. Pharaon anticipated having difficulty in raising the funds should he need to supply Independence with additional capital. TR at 751-53 (Naqvi). BCCI consented to Pharaon's request to restore the understanding as originally set forth in the Acquisition Agreement. TR at 756-57 (Naqvi).

47. Fulfilling the obligations under the Acquisition Agreement, Pharaon became the registered holder of 100 percent of Independence Bank's shares. BCCI arranged financing for the purchase of the shares,[11] provided for Independence Bank's continuing capital needs, selected officers and directors for Independence Bank, took possession of Independence Bank's share certificates and took other actions, all in accordance with the provisions of the Acquisition Agreement.

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[11] For a short time, a loan to Pharaon which was not a non-recourse loan was made by the Bank of Boston, but as described below that loan was secured in part by BCCI guarantee and later superseded in full by a loan from still another bank guaranteed by BCCI.

D. REGULATORY APPROVALS

48. Once Saubolle and Lodhi had initialed the stock purchase agreement on Pharaon's behalf, Fields began work on obtaining the approvals necessary for Pharaon to acquire Independence Bank. TR at 1,704-06, 1.743-44 (Fields). Because Independence Bank was a Federally-insured, State-chartered, non-member bank, and because both Pharaon and BCCI intended the bank supervisors to believe Pharaon was acquiring the bank individually, Pharaon requested approval for the acquisition from both the California State Banking Department and the Federal Deposit Insurance Corporation ("FDIC"), filing an application with the State banking department and a Change in Bank Control Act notice with the FDIC. TR at 481-82 (Naqvi), 690-91 (Fields). Fields received all of the information used to complete these regulatory filings from Shoaib, Helmy and Lodhi, the three BCCI employees coordinating the Independence Bank purchase. TR at 1,752 (Fields). Pharaon did, however, meet with Fields on June 10, 1985, and gave his personal confirmation of the accuracy of each of the regulatory filings before their submission. TR at 1,752-54 (Fields). Both the Change in Bank Control Act notice and the State application contained multiple and material misrepresentations, as described immediately below.

49. First, and most significantly, in the Change in Bank Control Act notice Pharaon misrepresented the party with beneficial ownership of Independence Bank. Pharaon stated that he would own 100 percent of Independence Bank's shares. TR at 1,754-55 (Fields); BoG Exs. 40 at 189 ¶ 3, 584 at 3,195, ¶ 3. This information, which contradicted the Acquisition Agreement that Pharaon signed just weeks before on May 17, was false. Rather than identify BCCI as the beneficial owner of 85 percent of Independence Bank, Pharaon falsely indicated to the FDIC that BCCI was serving as his "financial advisor," apparently referring to the

back-dated investment advisory agreement signed in January, 1985. TR at 1,765-67 (Fields); BoG Exs. 584 at 3,196 ¶ 8; and 17.

50. Second, Pharaon misrepresented how he intended to finance the acquisition of Independence. In the Change in Bank Control Act notice, Pharaon stated that a significant portion of the $23 million purchase price would be financed, TR at 1,755-57 (Fields), but represented that the interest on the acquisition-debt would be paid with income from his personal investments. TR at 1,755-56 (Fields); BoG Ex.584 at 3,315, Sched. 2. Pharaon also committed to provide more detailed information on the terms of the acquisition financing.

51. Pharaon purportedly provided this information in September, 1985. TR at 1,833-35 (Fields); BoG Ex. 587. In a letter supplementing the Change in Bank Control Act notice, Pharaon indicated that he intended to borrow $12.6 million from the Bank of Boston, which would be supported by a credit enhancement in the form of a letter of credit from the Banque Arabe et Internationale Investissement ("BAII"). BoG Ex. 587 at ¶¶ 1 and 2. He also indicated that the remainder of the purchase price, $8.5 million, would not be financed but would be drawn from his personal funds on deposit with BAII. Id. at ¶ 3.

52. As shown below in describing the financing arrangements, Pharaon affirmatively concealed BCCI's financing of the $2.3 million escrow deposit with a non-recourse loan. Further, Pharaon falsely indicated that he, rather than BCCI, would pay the interest on the Bank of Boston loan. He concealed the credit enhancement BCCI provided for the Bank of Boston loan, which took the form of a "back-to-back" letter of credit with BAII. Pharaon affirmatively concealed that his $8.5 million "deposit" at BAII was funded with the proceeds of a non-recourse loan

that BCCI made in August, 1985. Through this representation, Pharaon created the illusion that he would have $8.5 million of his personal funds invested in Independence Bank.

53. Pharaon indicated that he owned 15 percent of the shares of BCCI Holdings. TR at 1,773-76 (Fields); BoG Ex. 584 at 3,316. As discussed above, Pharaon owned only one-half of these shares beneficially and held the other half as nominee for ICIC. Disclosing the truth could have led to the revelation that ICIC, through ICIC Overseas and the ICIC Foundation and Trust, owned more than 25 percent of BCCI Holdings' shares, making ICIC the largest holder of BCCI Holdings shares. Naqvi's understated description of disclosure of such fact was succinctly that it would have caused "regulatory problems." TR at 123 (Naqvi). Additionally, such a disclosure would have caused Pharaon's Change in Bank Control Act notice to contradict BCCI's filings with the Federal Reserve. TR at 118, 122 (Naqvi); BoG Ex. 553 at 2,619. Pharaon submitted a falsified application.

54. Pharaon also misrepresented his ownership interest in NBG. In the Change in Bank Control Act notice, Pharaon stated that he owned 100 percent of NBG through several holding companies. TR at 1,771-73 (Fields); BoG Ex.584 at 3,316. Again, as noted above, Pharaon held 50 percent of the shares of NBG as nominee for BCCI. As with the disclosure of his nominee interest in BCCI Holdings, the disclosure of the nominee arrangement for NBG would have caused "regulatory problems," for BCCI as well as for Pharaon. Again, Pharaon chose to submit the false information.

55. Finally, Pharaon misrepresented his own financial condition to the FDIC. Imam, Pharaon's account officer at BCCI, prepared the personal financial statement which was

included in the Change in Bank Control Act notice on instructions from Shoaib. TR at 2,333-34 (Imam). Imam determined that Pharaon's indebtedness to BCCI was between $100 million and $200 million. TR at 2,335, 2,831 (Imam). The Change in Bank Control Act notice, however, characterized this indebtedness as only $61 million, and entirely omitted all of Pharaon's outstanding indebtedness to BCCI's Cayman Island bank, BCCI Overseas. TR at 1,783 (Fields); BoG Ex. 40 at 017, 0303. Much of Pharaon's indebtedness to BCCI was related to the purchase of BCCI Holdings shares, NBG shares and other nominee shares, TR 238-39, 248 (Naqvi), and BCCI sometimes exceeded its credit concentration limits to him by using the fraudulent "triangular placements." TR at 207, 216 (Naqvi).

56. Fields met Pharaon in early June, 1985, immediately prior to submitting the Change in Bank Control Act notice. TR at 1,746-47 (Fields). This was Fields' first and only meeting prior to closing the purchase of Independence Bank in October, 1985, with the man whom he considered his client. TR at 1,841 (Fields). Because he had received all of the information contained in the regulatory filings from Helmy, Lodhi and Shoaib, Fields wanted Pharaon to confirm as true all the representations these filings contained. TR at 1,771 (Fields). After reviewing each page and after hearing Fields' warning, jokingly delivered, that he could be subject to charges of perjury for misstatements in the notice, Pharaon indicated that all of the information was correct and signed the notice. TR at 1,771 (Fields).

57. Pharaon actually knew that the United States bank supervisors would be concerned with BCCI's influence over Independence Bank. A careful and knowledgeable banking lawyer, Fields understood that the Federal Reserve raised issues concerning BCCI's influence over CCAH, when BCCI served as "investment advisor" to CCAH's shareholders. TR at 1,929-30 (Fields). On the same day that he reviewed the

Change in Bank Control Act notice with Pharaon, Fields raised the possibility that the regulators might view BCCI as exercising a "controlling influence" over Independence Bank. Fields felt that the services BCCI supposedly was to provide Independence Bank pursuant to the investment advisory agreement, discussed above, and Shoaib's move from BCCI to Independence Bank where he was to become chief executive officer and chairman of its board, could provoke regulatory scrutiny. TR at 1,748-50 (Fields). Despite the questions Fields raised as to these matters, Pharaon did not provide any information to Fields concerning BCCI's involvement with Independence Bank. TR at 1,661 (Fields). He did not tell Fields that he had agreed to acquire 85 percent of the shares of Independence as a nominee for BCCI or that BCCI was financing most of the purchase price. TR at 1906, 1,922-32 (Fields). Neither did Fields know that Shoaib would continue to receive benefits, perquisites and payments from BCCI after his appointment to Independence Bank's board. TR at 1,942-43 (Fields).

58. Based upon Pharaon's materially false factual representations, in September, 1985, the FDIC accepted Pharaon's Change in Bank Control Act notice, and the California State Banking Department approved Pharaon's application to acquire Independence Bank. TR at 1,836-37 (Fields); BoG Exs. 585, 64. The transaction closed on October 1, 1985. Though Pharaon was in Los Angeles at the time, he did not attend the closing. TR at 1,849-51 (Fields).

E. FINANCING THE PURCHASE OF INDEPENDENCE BANK STOCK

1. General

59. The stock of Independence Bank was sold for $23 million. TR at 1.942-43 (Fields). Naqvi planned the purchase's financing TR at 547 (Naqvi), which was divided

into three components. BoG Ex. 606. The first component was a $2.3 million escrow deposit representing 10 percent of the purchase price, made at the time BCCI executed the stock purchase agreement. TR at 574-578 (Naqvi), 2,336 (Imam); BoG Ex. 40 at 201, ¶ 2.4. These funds came from a non-recourse loan from BCCI in the name of Pharaon. TR at 563 (Naqvi), 2,359-60 (Imam). The second component was a $8.5 million "deposit," which Pharaon represented as being from personal funds. TR at 547-548 (Naqvi), 2,359 (Imam). These funds also were provided by a non-recourse loan from BCCI in the name of Pharaon and were continuously subject to BCCI's control. TR at 547 (Naqvi), 2,374 (Imam); BoG Ex. 58. The third component was a $12.6 million loan from the Bank of Boston for the balance of the purchase price. TR at 547-48 (Naqvi). Of this third component, $5 million was supported with a back-to-back letter of credit, with BCCI absorbing the credit risk. TR at 629 (Naqvi),2,435-37 (Imam). BCCI serviced the Bank of Boston loan using the proceeds of a nonrecourse loan in the name of Pharaon. TR at 672-74 (Naqvi), 2,436-37 (Imam).

60. Ten months after the closing, BCCI re-financed the Bank of Boston loan using the proceeds of a non-recourse loan made in Pharaon's name. TR at 684-85 (Naqvi), 2,574-76 (Imam). As noted below, Pharaon knew of these arrangements and sought, and received, confirmation that he would not be liable for repaying these advances or the interest on them. In their totality, the financing arrangements make clear that Pharaon depended entirely upon BCCI for funding and believed he had no personal funds at risk in purchasing the stock of Independence Bank.

2. Elements of the financing

a. The $2.3 million escrow deposit

61. The first element in the financing of the Independence purchase was a $2.3 million good faith deposit, representing 10 percent of the $23 million purchase price, which was made at the time BCCI representatives initialed the stock purchase agreement. The funds for the escrow deposit came from BCCI. Naqvi instructed Imam, Pharaon's account officer, to arrange for $2.3 million to be paid to Banque de Commerce et Placement, S.A. (Geneva) ("BCP Geneva"), a BCCI affiliate designated to hold the good faith deposit in escrow. TR at 549-550, 554, 556-59 (Naqvi), 2,336 (Imam); BoG Ex. 40 at 201, ¶ 2.4. Acting on this direction, Imam issued an instruction to debit account number 0100-4498 at BCCI Overseas and remit the proceeds to BCP Geneva. TR at 558-59 (Naqvi), 2,338-41 (Imam); BoG Ex. 392. Imam's instruction was carried out and account number 0100-4498 was debited $2.3 million on June 24, 1985. TR at 559-63 (Naqvi), 2,342-43 (Imam); BOG Ex. 2,124, debit 0100-4498.

62. Account 0100-4498 was a current account, and as such could have either a positive balance representing the sum due the depositor, or a negative balance representing the debt of and hence a loan to the depositor. TR at 2,339-42 (Imam). This account was constantly overdrawn, meaning it constituted an outstanding loan to the account party. TR at 2,342 (Imam). The title on the account was "Dr. G. Pharaon (I.B.)." BoG Ex. 390. The abbreviation "I.B." referred to Independence Bank. TR at 2,341 (Imam). Although the account was in Pharaon's name, a secret non-recourse arrangement between BCCI and Pharaon exempted Pharaon from liability for loan principal or the interest that accrued on it. TR at 563 (Naqvi), 2,360 (Imam).

63. Pharaon knew BCCI had made this particular non-recourse loan in his name. In May of 1985, shortly before the $2.3 million was withdrawn from the account, Pharaon signed the Acquisition Agreement in which ICIC promised to arrange financing for the Independence purchase. BoG Ex. 37 at ¶ 4. In October of 1986, in connection with its annual external audit, BCCI Overseas sent Pharaon a balance confirmation request for account 0100-4498. TR at 548-49 (Naqvi); BoG Ex. 182. Pharaon executed the confirmation and returned it to the auditors, thereby acknowledging an outstanding liability due to BCCI Overseas of $4.3 million. There is no evidence in the record warranting an inference that Pharaon, a sophisticated businessman, did not understand this document. Further, at Pharaon's specific request, BCCI sent Pharaon several letters confirming that he would not be responsible for repaying certain loans from BCCI, including the liability represented by the overdraft in account 0100-4498. See, also, BoG Exs. 196 and 272.

64. For reasons unrelated to either Independence Bank or Pharaon, BCCI briefly moved this loan from BCCI Overseas to Credit and Finance Corporation ("CFC"), another BCCI affiliate. TR at 2,343-59 (Imam).[12] This account was paid in December, 1986, using the proceeds of other non-recourse loans from BCCI in the name of Pharaon. TR at 2,361 (Imam).

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[12] Although the mechanics of this "loan parking" are not currently material, it is significant that Pharaon did not repay the loan from BCCI Overseas. The loan moved from BCCI Overseas to CFC and later returned, unpaid, from CFC to BCCI Overseas. TR at 2,359 (Imam).

b. The $8.5 million payment

65. The second component of the Independence acquisition financing was the creation of the $8.5 million deposit at BAII. Supposedly, this deposit represented the personal funds that Pharaon would use to pay the sellers of Independence at closing. TR at 547-48 (Naqvi); BoG 587 at ¶ 3. From the perspective of United States banking supervisors, these funds constituted Pharaon's personal equity investment, which would not only provide current funds but also induce him to support Independence should the bank later experience financial difficulties. TR 2,248 (Helmi), 3,363 (Michaels). Like the $2.3 million escrow deposit, however, these funds came from BCCI, and Pharaon had no obligation to repay them. Further, both Pharaon and BCCI took active steps to conceal the source of these funds from the United States banking regulators.

66. The $8.5 million deposit at BAII represented the proceeds of a non-recourse loan from BCCI's Bahrain branch to Pharaon. TR at 587 (Naqvi), 2,362-65 (Imam). Again acting on Naqvi's directions, Imam arranged an $8.5 million loan from BCCI, S.A. (Bahrain) to Pharaon. TR at 572 (Naqvi), 2,362-65 (Imam). Imam prepared a so-called "letter of arrangement," a document describing a proposed loan, for review by BCCI's credit committee. TR at 57074 (Naqvi), 2,362-65 (Imam); BoG Ex. 404.[13] Pharaon reviewed this document and executed it. TR 575 (Naqvi); BoG 404. BCCI's credit committee granted the requested loan, unaware of the secret agreement relieving Pharaon of liability to repay the loan or any interest that accrued. TR

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[13] The agreement was subject to "completion of standard loan documentation," but the record does not include any further documentation though the funds were transferred as called for. See, BoG 561.

576-78 (Naqvi), 2,366-67 (Imam); BoG Ex. 405. The loan was disbursed from account number 1400-0793 at BCCI's Bahrain branch. TR at 2,402-03 (Imam); BoG Ex. 411 at 2,166.

67. Imam issued instructions to BCCI, S.A. (Bahrain) to remit the loan proceeds to BAII so that it might then establish the required deposit in Pharaon's name. TR 589-92 (Naqvi), 2,367-69 (Imam); BoG Ex. 406. The loan proceeds went to BAII in August, more than 30 days prior to the closing. BoG Exs. 56, 406, 410. BCCI's Bahrain branch requested that BAII confirm receipt, and that it was holding the loan proceeds as a deposit in the name of Pharaon. TR 2,369-70 (Imam); BoG Ex. 410. BAII did so. TR at 2,372-73 (Imam); BoG Ex. 56. BCCI then instructed BAII not to release these funds until the closing of the Independence acquisition, and further instructed BAII to hold the funds pending instructions from BCCI should the acquisition not occur. TR at 2,373-74. The documentation for this transaction evidences control over the BAII deposit by BCCI, and not by Pharaon.

68. Pharaon also was are of the arrangements surrounding this $8.5 million loan. As already noted, he signed a letter of arrangement, another legal document he chose not to share with his attorney, requesting the advance. TR at 575 (Naqvi). As with the $2.3 million escrow loan balance, he received a request from BCCI's external auditors to confirm the loan balance, which he executed and returned. TR at 610-11 (Naqvi), 2,229-30 (Imam); BoG Exs. 419, 238, and 534. Further, as with all of his non-recourse borrowing, Pharaon requested BCCI to confirm that the $8.5 million loan was without recourse and that he bore no responsibility for any accrued interest. TR at 272-314 (Naqvi). He received multiple letters indicating that he was not liable for the $8.5 million loan from BCCI Bahrain. BoG Exs. 196, 272.

c. $12.6 million loan from the Bank of Boston

(1) The original loan

69. The third element of the Independence financing was the loan of $12.6 million from the Bank of Boston. TR at 547-48 (Naqvi). At the time of the Independence Bank purchase, as noted above, BCCI was experiencing extreme liquidity pressures. The Bank of Boston's willingness to extend Pharaon credit relieved BCCI from booking another credit extension to Pharaon. TR at 479, 543 (Naqvi). This third-party financing also obscured BCCI's role in the Independence Bank acquisition, helping it to avoid the scrutiny of the United States bank supervisors. TR at 479-80 (Naqvi). BCCI, however, was involved in the Bank of Boston loan, having guaranteed repayment of the Bank of Boston loan with a back-to-back letter of credit. BCCI also paid the interest on the loan, and refinanced the loan when Pharaon defaulted. Further, Pharaon concealed BCCI's true interest in Independence from the Bank of Boston to obtain the financing.

70. Helmy negotiated the terms of the $12.6 million loan with the Bank of Boston, supposedly on Pharaon's behalf. TR at 2,248-50 (Helmy), 2,281-83 (Dickerson). As part of the financing package, the Bank of Boston originally requested Pharaon's personal financial statements to verify that he possessed the financial wherewithal to repay the credit, but Helmy refused to provide them. As an alternative, the Bank of Boston suggested that Pharaon obtain a credit "enhancement" in the form of a letter of credit, to which Helmy agreed. TR at 2,283-85 (Dickerson).

71. The required letter of credit came from BAII, not from BCCI. BoG Ex. 587 at ¶ 2 and page 3,348. However, BCCI in turn issued the functional equivalent of a guarantee favoring BAII, which was disclosed neither to the Bank of

Boston nor to the United States banking regulators, under the terms of which BCCI agreed to reimburse BAII for any draw-down that the Bank of Boston might make under the BAII letter of credit. TR at 634-44 (Naqvi), 2,434-36 (Imam); BoG Ex. 72.

(2). Interest payments on the Bank of Boston loan

72. Interest on the Bank of Boston loan was due quarterly in arrears, and no principal payments were due until 1989. TR ar 652-54 (Naqvi), 2,068 (Chan); BoG Ex. 587 at 3,343. Between October 1, 1985, the day of the closing, and July 7, 1986, the day BCCI repaid the Bank of Boston loan, interest payments were due on the last days of December, March and June. BCCI made each of these interest payments with the proceeds of a non-recourse loan in the name of Pharaon.

73. BCCI had not yet established a procedure for making these interest payments when the first interest-notice came to Independence in December, 1985. TR at 2,067 (Chan). Within Independence Bank, responsibility for the payment fell to Joyce Chan ("Chan"), to whom Lodhi, as an officer of BCCI, had offered the position of assistant to the chairman of the board. TR at 2,064 (Chan). Chan delivered the notice to Helmy and Lodhi, both still officers of BCCI, who informed her that they would pay it, but apparently failed to do so as Chan received several late notices in January of 1986. TR at 2,067-68 (Chan).

74. In the middle of January, 1986, Shoaib sent Imam, at BCCI, a telex informing him that the interest payment due on December 31, 1985 had not been paid. TR at 2,439-40 (Imam); BoG Ex. 90. In response, after receiving Naqvi's approval at BCCI, TR 654-56 (Naqvi), Imam made a non-recourse loan in the name of Pharaon and used the proceeds for the interest payment. TR at 2,440-44 (Imam).

He did this by issuing instructions to debit account number 0100-4498, the same loan account from which the $2.3 million good faith deposit had been drawn. TR at 654-56 (Naqvi), 2,340-44 (Imam); BoG Ex. 92. Imam's instructions were executed on January 17, 1986, when this account was debited and the proceeds remitted to the Bank of Boston. TR at 656 (Naqvi), 2,24243 (Imam); BoG Ex 390 at 2,131.

75. On March 31, 1986, the second interest payment on the Bank of Boston loan came due. Chan, at Independence, transmitted a reminder to Lodhi in New York about the payment. TR at 2,070 (Chan). At Naqvi's directions from BCCI, TR at 657-66, Imam at BCCI originated another loan in the name of Pharaon by again issuing instructions to debit account 0100-4498. TR at 2,561-62 (Imam); BoG Ex. 432. He directed that the loan proceeds be paid to the Bank of Boston, and BCCI personnel executed Imam's instructions. TR at 659 (Naqvi), 2,561-62 (Imam); BoG Ex. 390 at 2,135.[14]

76. The third and, as subsequent events would dictate, final interest payment to the Bank of Boston came due on June 30, 1986. Again, Chan reminded Lodhi, at BCCI in New York, to make the payment. TR at 2,073-74 (Chan). Chan also sent a reminder directly to Imam at BCCI in London. TR at 2,569 (Imam). Once again, on Naqvi's direction Imam created a non-recourse loan in the name of Pharaon and disbursed the proceeds to the Bank of Boston.

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[14] The statement of account 0100-4498 shows a debit entry of $318,615 in May of 1995. Because the debit instruction from Imam to BCCI Overseas contained no account information, the proper account debit entry was not made until May of 1986. TR at 661 (Naqvi). The difference of $15 between the interest payment due and the debit entry represents the cost of telex charges. TR at 659-660 (Naqvi).

TR at 664-65 (Naqvi), 2,570-71 (Imam); BoG Ex. 495. Again, the debit entry appears in the statement for account number 0100-4498, the same account utilized for the other interest payments and the escrow deposit, and again, Imam sent a telex to the Bank of Boston confirming that the interest payment had been made. TR at 665 (Naqvi), 2,571, 2,574 (Imam, BoG Ex. 390 at 2,136, BOG Ex. 470.

77. These three interest payments on the Bank of Boston loan totalled slightly less than $1 million. BoG Ex. 107. Account number 0100-4498 at BCCI Overseas in Grand Cayman, which operated as a loan account in the name of Pharaon, served as the source of each interest payment. Pharaon, however, had no obligation to repay the BCCI loans used to make these payments or the interest that accrued on these loans. He received requests from BCCI to confirm the loans for its external auditors and he did so without mentioning his secret arrangement with BCCI. Further, he affirmatively requested that BCCI verify that he bore no personal liability for these loans, and BCCI did so.

(3) Fraud on the Bank of Boston

78. Since the shares of Independence were to constitute collateral for the Bank of Boston loan, Pharaon could not disclose to the Bank of Boston that he was acquiring Independence Bank as BCCI's nominee and still obtain the requested financing. As part of the loan documentation, the Bank of Boston required that Pharaon's counsel, Morrison & Foerster, provide a legal opinion. TR at 1,841-43 (Fields) As is customary when rendering such opinions, Morrison & Foerster relied on certain written representations about the loan made by Pharaon, whom it considered its client. Morrison & Foerster included these representations as part of its opinion and forwarded them to the Bank of Boston. BoG Ex. 586 at 3,339-40.

79. The Bank of Boston relied on Pharaon's certification of ownership of the Independence stock which the Bank of Boston would hold as collateral. Pharaon certified that he would beneficially own 100 percent of the shares of Independence Bank and that there would be no financing other than that of the Bank of Boston financing involved in the purchase. TR at 1,845-47 (Fields). Referring to the shares of Independence pledged to the Bank of Boston, Pharaon stated: "I have not conveyed any beneficial interest in the Pledged Shares . . . to any other person or entity." BoG Ex. 586 at 3,339, ¶ 3. At that time Pharaon had already conveyed beneficial ownership of 85 percent of the shares of Independence to BCCI through the Acquisition Agreement of May 17, 1985. BoG Ex. 37 at ¶ 2. Pharaon also stated that: "[N]o person or entity other than the Bank [of Boston] has made advances or incurred an obligation giving value to enable me to acquire rights in or the use of the Shares" of Independence Bank. BoG Ex. 586 at ¶ 5. ICIC had previously committed in the Acquisition Agreement to arrange financing for the purchase of these shares and, when Pharaon made these representations, BCCI had already financed the $2.3 million good faith deposit and the $8.5 million loan used to create the BAII deposit. BoG Ex. 37 at ¶ 4.

(4) Repayment of the loan

80. In the spring of 1986, Independence purchased a failed bank from the FDIC. TR at 2,074 (Chan), 1,866-67 (Fields). Independence knew that making this purchase without the Bank of Boston's approval would constitute an "event of default" under the loan agreement, and it requested the Bank of Boston's approval. The Bank of Boston refused to grant approval. TR at 2073-75 (Chan). Independence purchased the failed bank without the approval, and Bank of Boston then called a default on the loan. TR at 2974-75 (Chan), 1,866-67 (Fields). Shoaib, then Independence's

chief executive, and Chan, his assistant, along with Helmy and Lodhi, who were working for BCCI in its New York agency, flew to Boston during the Memorial Day holiday, and unsuccessfully attempted to convince the Bank of Boston to reverse its decision. TR at 2,076-77 (Chan).

81. To protect BCCI's ownership interest in Independence, Naqvi needed to ensure that the Bank of Boston did not foreclose on the loan and sell the Independence Bank stock, which it held as collateral. TR at 684-685 (Naqvi). Naqvi believed that Pharaon would not use his own money to repay the Bank of Boston, since with no personal funds at risk in Independence it was doubtful that he would advance $12.6 million to salvage his 15 percent of a $23 million bank. TR at 684-85 (Naqvi). Additionally, Redec, Pharaon's wholly-owned corporation, was experiencing its own financial difficulties at this time. Redec had defaulted on a debt of approximately $500 million to a lending syndicate which included the Bank of Boston, and its creditors were contemplating legal action. TR at 684-85 (Naqvi), 1,420(Lodhi). Naqvi was concerned that, because of Redec's problems, Pharaon would be unable to borrow the required funds from another lender. TR 684 (Naqvi); BoG 446. Consequently, Naqvi arranged BCCI's repayment of the indebtedness to Bank of Boston on the default. TR 684-85 (Naqvi).

82. Naqvi directed Imam to cooperate with Shoaib and Lodhi in arranging the repayment. TR at 685-91 (Naqvi), 2,576 (Imam). Lodhi, in turn, instructed Imam to work with Fields, who was negotiating with the Bank of Boston over the default. TR at 1,91719, 1990-91 (Fields), 2,578 (Imam). Fields sent Imam a telex with remittance instructions for the $12.6 million in principal and interest due to the Bank of Boston. TR at 2,5768 (Imam); BoG Ex. 157.

83. With Naqvi's approval, Imam created a non-recourse loan account in BCCI Panama. TR at 686-87 (Naqvi), 2,578-79 (Imam). In still another example of triangular placement obfuscating the source of funds, Imam issued instructions to remit the loan proceeds of $12.6 million through BAII, in conformity with Fields' instructions. 686-87 (Naqvi), 2,580 (Imam); BoG Ex. 156. Imam confirmed to BAII that the funds had been remitted, TR at 2,484-85 (Imam); BoG Ex.154, and also informed Fields that he had arranged for the repayment. TR at 2,585 (Imam); BoG Ex. 474.

84. As with the $2.3 million escrow deposit and the $8.5 million deposit at BAII, the funds used to repay the Bank of Boston loan came from a non-recourse loan account at BCCI. TR at 717 (Naqvi). The loan was not made directly to Pharaon, however, but to a shell corporation, Leamington, which BCCI had established in the Isle of Man and which it controlled. TR at 707708 (Naqvi). The statement from the Panama branch for account number 1400-0386, in Leamington's name, reflects a $12.6 million debit entry at this time. TR at 705-07 (Naqvi), 2,586 (Imam); BoG Ex. 602 at 3,373. BCCI eventually transferred this loan to other loan accounts in the Cayman Islands. TR at 2,587-89 (Imam). Of the total $12.8 million balance, $12 million was transferred to account number 1100-8528, a non-recourse loan account in Pharaon's own name. TR 717 (Naqvi), 2,588-90 (Imam); BoG Ex. 603 at 3,396, BoG Ex. 602 at 3,371. The remaining balance of $800,000 was transferred to a second non-recourse loan account. TR at 2,588-90 (Imam).

85. In a movement similar to that used to create the $8.5 million "deposit" at BAII, the loan proceeds were "triangularly" placed temporarily in a deposit account at BAII before being transmitted to the Bank of Boston. TR at 1877, 1880 (Fields); BOG Ex. 474. This concealed BCCI's

refinancing of the Bank of Boston loan, and its involvement with Independence Bank generally. TR at 697 (Naqvi). From the BAII deposit account, the funds were transferred onward to Morrison & Foerster's escrow account and then to the Bank of Boston. TR at 578 (Naqvi); BoG Ex. 154.

86. Pharaon had full knowledge of this transaction as well. In October of 1986, BCCI asked him to confirm the outstanding balance in account number 1100-8528, the account to which $12 million of the original advance had been transferred, and he executed a balance confirmation stating that he owed just over $12 million to BCCI and returned it to BCCI's external auditors. TR at 2,591-92 (Imam); BoG Ex. 182. He received a similar request in November 1987, and again confirmed the outstanding balance in this account. TR at 2,593 (Imam); BoG Ex. 245. As discussed below, after deceiving BCCI's outside auditors Pharaon requested and received confidential letters from BCCI declaring that he bore no liability for repaying the balance in this loan account.

(5) BCCI takes the collateral shares

87. After paying off the Pharaon loan to Bank of Boston, and as permitted by the Acquisition Agreement, BoG Ex. 37 at ¶ 5, BCCI took possession of the share certificates of Independence Bank which had served as collateral to secure the Bank of Boston loan. Once the loan was repaid, the Bank of Boston, through Fields, released the shares of Independence to Lodhi, still an attorney with BCCI. TR at 1,887-88 (Fields). Attached to the shares was a stock-power executed by Pharaon in blank, which transferred ownership of the share certificates from the registered owner to the holder. TR at 1,888-91, 1,874-75 (Fields). Lodhi delivered the share certificate representing 100 percent of Independence Bank's shares, along with the stock-power, to Imam in London, thereby giving BCCI complete control over both the

beneficial and legal ownership of Independence Bank's voting shares. TR 1,437 (Lodhi). Imam placed the certificate in BCCI's safe. TR at 2,594 (Imam).

88. At Naqvi's instruction, Imam attempted to have Pharaon execute a pledge agreement for these shares. TR at 726-27 (Naqvi). Imam was unable to obtain Pharaon's signature to the document until 1989, during one of Pharaon's visits to BCCI's London offices. TR at 2,623-24. According to the pledge agreement, the voting rights for the Independence shares passed from Pharaon as pledgor to BCCI as the pledgee. TR at 1,636-37 (Naqvi); BoG Ex. 378 at 2,058, ¶ 17.

89. The pledge agreement confirmed BCCI's pre-existing right under the Acquisition Agreement to direct the vote on 85 percent of Independence Bank's shares. BCCI obtained the pledge out of an abundance of caution, the sizeable credits outstanding in the name of Pharaon causing Naqvi some concern. The pledge provided additional collateral and doubled assurances of BCCI's rights over Independence Bank to protect BCCI. TR at 1,634-37 (Naqvi).

3. Other acquisition costs

90. In addition to providing virtually all of the $23 million purchase price for Independence Bank as of July, 1986, BCCI also paid other expenses associated with the acquisition. BCCI paid all of the legal fees incurred in the acquisition, paid the Bank of Boston's expenses in granting Pharaon the $12.6 million loan, and paid the tax obligation that Pharaon incurred through the stock purchase agreement. First, BCCI paid the legal fees of both Rosenblum, Parish, BCCI's lawyers, and Morrison & Foerster, purportedly Pharaon's lawyers. TR at 1,688-89, 1,894-96 (Fields), 2500-01 (Saubolle). Just as Independence Bank's purchase price, these funds came from a non-recourse loan in the

name of Pharaon. TR at 951-52 (Naqvi). In April, 1986, on Naqvi's direction, Imam authorized a debit of $51,000 to account number 0100-4498, the same account used to fund the $2.3 million escrow deposit and other costs, and directed payment of the proceeds to Rosenblum, Parish, which was consummated in accordance with Imam's instructions. TR at 949-52 (Naqvi); BoG Ex. 447, Ex. 390 at 2,135. Later, Lodhi requested that Imam pay legal fees for both Morrison & Foerster and Rosenblum, Parish. TR at 2,565 (Imam); BoG Ex. 113. Again, fees were paid from debits in account 0100-4498. TR at 2,565-56 (Imam); BoG Ex. 390 at 2,135.

91. BCCI also reimbursed the Bank of Boston for expenses incurred in connection with its loan to Pharaon. Shoaib sent a telex to Imam in January of 1986, requesting him to remit to the Bank of Boston $15 for un-reimbursed telex charges, $3,820 for a commitment fee, and $3,500 for a second commitment fee. TR at 2,443-46 (Imam); BoG Ex. 93. These charges total $7,335.83, which was paid to the Bank of Boston, appearing as a debit on the statement for the same account, 0100-4498. BoG Ex. 390 at 2,131. In March of 1986, Shoaib requested that BCCI reimburse the Bank of Boston for legal expenses incurred in making the loan to Pharaon, and BCCI again made the requested reimbursement, represented by a debit in the same account 0100-4498. TR at 2,549 (Imam); BoG Ex. 390 at 2,134.

92. BCCI also paid other miscellaneous acquisition expenses. Shoaib sent a request for $151,210 in March, 1986 to cover the costs of a California excise tax, for which Pharaon was expressly responsible under the stock purchase agreement. TR at 2,354-55 (Imam); BoG Exs. 112, and 584 at 3,264. Imam responded by granting a non-recourse loan in the name of Pharaon, and directing the proceeds to be disbursed to discharge his tax liability. TR at 2,444-45; BoG Ex. 437. Again, the loan appears as a debit in the statement

for the same account, 0100-4498. TR at 2,555-57 (Imam); BoG Ex. 390, at 2,134.

4. Source of funds

(a) Pharaon's non-recourse loan arrangements

93. Pharaon maintained two types of loans with BCCI, to wit: recourse loans, and non-recourse loans. For bookkeeping purposes, both BCCI and Pharaon identified the recourse borrowing as "Category A" loans for which Pharaon bore full repayment responsibility, and the non-recourse borrowing as "Category B" through "Category F" loans for specific purposes, though some of these categories varied from time to time. Pharaon bore no liability for repaying the principal or interest of the non-recourse loans beyond loss of the non-beneficially held stock. TR at 230-31, 1,643 (Naqvi), 2,321-22, 2,405-12 (Imam). Pharaon held the shares purchased with the proceeds of the non-recourse loans as a nominee for BCCI. TR at 235-52 (Naqvi). This was one aspect of Abedi's strategy of investment by BCCI's to realize "extraordinary profits" and replace BCCI's depleted capital base. TR at 187 (Naqvi).

94. Category B loans were sub-divided into two categories. The proceeds of Category B (A) loans were used to purchase shares of Attock Oil in Pharaon's name as BCCI's nominee for BCCI's beneficial ownership, and the proceeds of Category B(B) loans were used to purchase shares of BCCI Holdings in Pharaon's name as BCCI's nominee for BCCI's beneficial ownership. The proceeds of Category C loans were used to purchase 50 per cent of the shares of NBG in Pharaon's name as BCCI's nominee for BCCI's beneficial ownership. Category D loans were not the subject of any evidence entered herein. The proceeds of Category E loans were used to purchase the shares of Independence Bank in Pharaon's name as BCCI's nominee

for BCCI's beneficial ownership, and Category F represented contingent liabilities such as guarantees incurred by Pharaon but for which BCCI had privately indemnified him. TR at 2,321-24, 2,359-60, 2,405-129 (Imam).

95. The shares that Pharaon held as nominee for BCCI secured these non-recourse loans. TR at 288-89 (Naqvi). As nominee, Pharaon held shares of BCCI Holdings, NBG, Tradigrain, which was an entity which had been obtained by BCCI in partial satisfaction of defaults by the Gokal shipping interests, Independence Bank, and FIIL, which was the holding company for Attock Oil. TR at 188-89 (Naqvi). BCCI valued these holdings at $448 million in 1986. Although Pharaon was the registered owner of these shares, BCCI was the beneficial owner of much of the holdings. TR at 289-90 (Naqvi). BCCI assumed all of the economic risk inherent in any equity investment and stood to benefit by any increase, or suffer from any decrease in the value of the shares securing the nonrecourse loans. TR at 279, 1,637-38 (Naqvi); BoG Exs. 37 at ¶¶ 3, 4, BoG Ex. 24 at ¶¶ 2, 4. Naqvi booked the $438 million in non-recourse loans required to purchase these shares at various entities, to wit: $251 million at BCCI, S.A., $30 million at BCCI Overseas, $87 million at ICIC Overseas, and $70 million at the

National Commercial Bank of Saudi Arabia.[15] TR at 291-92 (Naqvi).

96. Pharaon knew his loans were organized into these categories. In December of 1986, Pharaon wrote to BCCI requesting confirmation that his Category B, C, and D loans had been settled and discharged in full. TR at 231-32 (Naqvi); BoG Ex.487, 542A. Because BCCI's books carried these loans as outstanding at the time Pharaon sent his letter, BCCI could not provide such a confirmation, even though Naqvi and Abedi recognized that Pharaon was not liable for their repayment. TR at 231-32, 284 (Naqvi).

97. Abedi and Naqvi responded to the letter by telephone. TR at 251-52 (Naqvi); BoG Ex. 194. During the conversation, Pharaon acknowledged that the loans had not been paid, but requested a guarantee from the lending institutions indemnifying him against liability on the loans. TR at 262 (Naqvi). Abedi explained that it would be difficult for BCCI's banks to provide this indemnity, but offered instead to issue a personal guarantee. TR at 254, 26162, 266-71 (Naqvi); BoG Exs. 194, 196, and 196A. Under this guarantee, should BCCI ever attempt to collect

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[15] The National Commercial Bank of Saudi Arabia is not a BCCI entity, but because it served as the Funded Bank in a "triangular placement" with BCCI and Pharaon, the credit exposure on the $70 million dollar loan to Pharaon remained with BCCI. The National Commercial Bank of Saudi Arabia advanced $70 million to Pharaon, and BCCI placed a corresponding $70 million deposit with the National Commercial Bank of Saudi Arabia with the understanding that if the loan to Pharaon was not paid, the National Commercial Bank of Saudi Arabia could set off any amount due it against BCCI's deposit, thus expunging Pharaon's exposure. TR at 292 (Naqvi).

from Pharaon on the loans, Abedi would be obligated to hold Pharaon harmless, and Abedi's guarantee specifically referenced the Independence Bank purchase loans.[16]

98. Pharaon recognized that Abedi did not have the personal financial means to support this guarantee, and insisted upon "comfort letters" from the lending institutions. TR at 286, 272 (Naqvi). Abedi and Naqvi flew to Paris in December of 1986, where they met with Pharaon to resolve the situation. TR at 272-73, 27694 (Naqvi); BoG Ex. 588. At the meeting, Abedi, Naqvi and Pharaon formalized the arrangements surrounding Pharaon's service as BCCI's nominee. Pharaon agreed to continue serving as both BCCI's nominee investor and nominee borrower, and BCCI agreed to provide Pharaon with the letters he sought indemnifying him against any liability for the nominee loans or any interest that accrued on them. TR at 298 (Naqvi).

99. Pharaon received the promised annual comfort letters from the lending banks.[17] These letters, signed by Naqvi

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[16] BOG Ex. 196 at 1,081, shows account numbers 0100-4498, which paid for the $2.3 million escrow deposit, the interest on the Bank of Boston loan and the acquisition expenses, 1100-8528, the proceeds of which went to repay the Bank of Boston loan, and 14000793, the proceeds of which funded the $8.5 million deposit at BAII that was used to fund the purchase of Independence Bank.

[17] TR at 313-14 (Naqvi), BOG Ex. 272 (letters from BCCI, S.A., and BCCI Overseas dated February, 1988, listing loans that Pharaon need not repay, including account numbers 0100-4498 (at 1346), 1100-8528 (at 1346) and 1400-0793 (at 1344)); TR at 337-38 (Naqvi), BOG Ex. 521 (letter dated

(continued...)

on behalf of both BCCI, S.A. and BCCI Overseas, confirmed that a series of credit extensions from BCCI to Pharaon were secured by shares, that the proceeds realized upon a sale of the shares would be utilized to repay the loans made in Pharaon's name, and that Pharaon would not be personally liable for the loans or the interest accrued on the loans.

100. Pharaon took other actions showing that he understood BCCI was making non-recourse loans in his name. While BCCI was sending Pharaon the comfort letters, Pharaon was confirming the balances in these same loan accounts to BCCI's external auditors. BOG Exh. 419, a letter dated November 20, 1985, confirmed a balance of $8.5 million in account 1400-0793; BOG Exh. 182, a letter dated October 31, 1986, confirmed a balance of $4.3 million in account 0100-4498 and a balance of $12 million in account 1100-8528; BOG Exh. 238, a letter dated October, 1987, confirmed a balance of $8.5 million in account 1400-0793; and, BOG Ex. 245, a letter dated November, 1987, confirmed a balance of $14 million in account 11008528. Pharaon deceived BCCI's external auditors by failing to disclose that he bore no responsibility for repaying these advances. The contradiction between the hold harmless letters and the balance confirmations was an essential element in BCCI's strategy and in Pharaon's participation. Had

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[17](...continued)
January, 1989 from BCCI Overseas, listing loans Pharaon need not repay, including account 1400-0793); TR at 344-45 (Naqvi), BOG Ex. 535 (letter from BCCI Overseas, dated November, 1989, listing loans Pharaon need not repay, including account 1400-0793), TR. at 355-58 (Naqvi) and BOG Ex. 538 (same, dated March, 1990); BOG Ex. 542A (letter from Pharaon to Iqbal in which Pharaon indicates that he received the comfort letters annually).

Pharaon disclosed this to the external auditors they necessarily would question the credit extended him by BCCI, and might have discovered that BCCI was making high-risk investments in an attempt to replace its depleted capital.

101. In February of 1991, Pharaon wrote to Naqvi's successor at BCCI concerning these non-recourse arrangements. TR at 1,978-85 (Naqvi). In his letter, Pharaon acknowledged that the non-recourse loans made to him "are the full and complete responsibility of BCCI and supposedly fully secured by tangible assets and/or securities as confirmed annually in writing to me by BCCI's management for the past eight years. ...[T]hese transactions ... were managed under BCCI's full discretion and guarantees...." BoG Ex. 542A.

b. Proceeds of BCCI/NBG stock sales not used

102. Pharaon did not purchase the Independence Bank stock with the proceeds received from the sale of his beneficial interests in BCCI Holdings and NBG as he claimed. As noted above, one of Pharaon's companies, Redec, experienced severe financial difficulties late in 1985 and early 1986. TR at 758-61 (Naqvi); BoG Ex. 580. The corporation was attempting to restructure some $500 million in credit extensions. TR at 1,420-22 1 467-69 (Lodhi). Pharaon was forced to liquidate some personal investments to raise cash, including his shares of BCCI Holdings and NBG. TR at 758-62 (Naqvi).

103. With knowledge of Pharaon's situation, and being the beneficial owner of one-half of the shares of both NBG and BCCI Holdings registered in the name of Pharaon, BCCI agreed to find a buyer for Pharaon's beneficially owned shares. TR at 761 (Naqvi). Pharaon negotiated directly with Abedi and Naqvi for a sales price of $95 million for his beneficially owned shares in BCCI Holdings TR at 759-60

(Naqvi). Pharaon agreed to continue to hold the non-beneficial shares of BCCI Holdings as nominee. TR at 758-26 (Naqvi).

104. At a meeting late in 1985, Abedi and Pharaon agreed not only to the $95 million price for his BCCI Holdings shares, but also agreed that Pharaon would sell his 50 percent interest in NBG. TR at 763 (Naqvi). Abedi expressed his desire that Pharaon sell these shares to CCAH. TR 763-64 (Naqvi). Although an outside consulting firm had valued NBG at approximately $160 million, TR at 764-66 (Naqvi), Pharaon hoped to sell 100 percent of NBG for approximately $200 million. TR at 766 (Naqvi). In anticipation of this sale, Abedi agreed in December of 1985 to advance Pharaon $80 million, one-half of the outside consultant's valuation, against the funds Pharaon would eventually receive from the sale of his one-half interest in NBG. TR at 768-69. This occurred at least five months before Pharaon, BCCI and CCAH agreed on a $220 million purchase price for NBG. TR at 767-69 (Naqvi). Of this $220 million, CCAH retained $15 million to cover outstanding liabilities, leaving $205 million for BCCI and Pharaon to divide equally, after of course accounting for the $80 million Pharaon had already received in December of 1985, so that Pharaon received appreciably more than the outside consultant had predicted. TR at 767-69 (Naqvi).

105. Imam, Pharaon's account officer, kept a detailed accounting of how these sale proceeds were allocated. TR at 779-86 (Naqvi), -2,637-40 (Imam); BoG Ex. 489. This record, dated in December of 1986, shows $95 million for BCCI shares and $102.5 million for NBG shares, a total of $197.5, due to Pharaon. TR at 780-81 (Naqvi), 2,638-39 (Imam); BoG Ex. 489. Starting from this balance, the record shows two cash payments on Pharaon's behalf occurring in December, 1985, after the Independence Bank sale closed, totalling $65 million. BCCI transmitted these

monies to First Chicago Bank. TR at 2,639 (Imam). Imam's accounting also shows that BCCI forgave personal obligations that Pharaon incurred totalling $53 million. Total payments to Pharaon at this point were $53 million. TR 2,540 (Imam); BoG Ex. 489. The second page of Imam's accounting shows a $30 million cash payment on April 12, 1986, a $31 million cash payment on May 6, 1986, again to First Chicago, TR at 2,649-50 (Imam), and several minor disbursements to Pharaon, leaving a total remaining balance due Pharaon of slightly more than $14 million. BoG Ex. 498.

106. Imam's accounting is fully consistent with a similar accounting prepared in April, 1986 by Heme Zavahir ("Zavahir"), who managed Pharaon's personal and business finances. TR 251, 896-97 (Naqvi), 1,435-36 (Lodhi) 3,22-23, 2,646 (Imam); BoG Ex. 598. Zavahir's record shows a total due Pharaon of 175 million, consisting of $80 million and $95 million. BoG Ex. 598. As noted above, Pharaon received $95 million for his BCCI Holdings shares. In April of 1986, when Zavahir prepared his accounting, the final sale price CCAH would pay for NBG had not yet been established. TR at 758-61 (Naqvi). The $80 million reference in accounting corresponds to one-half of NBG's estimated value in December of 1985 and the $80 million BCCI agreed to advance Pharaon against the eventual sale of his interest in NBG.[18] Zavahir's record corresponds to Imam's accounting, and shows BCCI forgiving $53 million of Pharaon's personal indebtedness, with two cash payments totalling $65 million. TR at 2,648-50 (Imam); BoG Ex. 598.

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[18] Tr. at 768-69 (Naqvi), shows NBG's value. Zavahir's record later contains an entry for $22.5 million labelled "NBG differential." Adding the $80 million to this $22.5 million differential yields $102.5 million, which was the amount Pharaon received on the sale of the NBG shares.

This totals $118,315,250.40, which is the same figure that appears in Imam's accounting. Further, Zavahir's records show a $31 million payment in May, 1986, again corresponding to Imam's account.

107. Neither Imam's December, 1986 accounting of the proceeds from the sale of Pharaon's interest in BCCI Holdings and NBG, nor Zavahir's partial accounting, shows any of the $197.5 million owed to Pharaon as being contributed toward the purchase of stock in Independence Bank. TR at 786 (Naqvi), 2,651 (Imam); BoG Exs. 489, 598.

108. In 1990, after various entities, including Enforcement Counsel, began investigating BCCI's affairs, Pharaon learned from Imam that BCCI intended to provide United States banking supervisors with the Acquisition Agreement. TR at 2,663-65 (Imam). Pharaon approached Naqvi and contended that the proceeds from his sale of his BCCI Holdings shares had been utilized to pay for Independence Bank. TR at 1,094 (Naqvi). However, the documents show and testimony confirms that the sale of these shares did not occur until December of 1985, three months after the closing of the Independence Bank purchase. Pharaon had received a full accounting of the sale proceeds, and it was not possible that the payments for NBG stock were utilized to pay for the prior purchase.

F. OPERATING INDEPENDENCE BANK

1. Selection and control of senior personnel

109. Abedi designated Kemal Shoaib ("Shoaib"), a BCCI employee, as the senior BCCI officer coordinating the purchase of Independence. TR at 429-430 (Naqvi), 2,468-69 (Saubolle). While working in London, Shoaib oversaw BCCI's operations in the United States, and openly aspired

to manage a bank there. TR at 480-81. After the purchase of the bank had closed, Abedi directed that Shoaib become Independence Bank's chief executive and chairman of its board. TR at 1,852 (Fields); 480, 937 (Naqvi). Pharaon had no part in this decision, TR at 1,385-86 (Naqvi), and would not likely have chosen him as he had a low opinion of Shoaib, considering him "a very lazy banker." TR at 1,435-36 (Lodhi).

110. Shoaib retained financial ties to BCCI while at Independence Bank. Abedi determined the amount of Shoaib's salary at Independence Bank, and at the same time BCCI continued to make contributions to Shoaib's pension fund, to include him in its group insurance policy, and to provide him with the same preferential loan rates furnished to BCCI employees. These benefits were to continue for as long, and only for as long, as Shoaib would continue his employment at Independence Bank. TR at 935-40, 97476, and 986-87 (Naqvi); BoG Exs. 423, 492.

111. While working at Independence Bank, Shoaib almost never met with Pharaon. TR at 1,448-49 (Lodhi), 2,106-07 (Chan). He was, however, constantly in contact with officers from BCCI and frequently travelled to London. TR at 2,100-01 (Chan), 3,366-7 (Michaels). He sought BCCI's approval of Independence Bank's annual budget. TR at 945-46 (Naqvi).

112. In addition to Shoaib, BCCI also approved other appointments to the Board of Directors of Independence Bank and interviewed certain candidates for its senior officers. Independence Bank's board consisted of five members: Shoaib; Morton Michaels ("Michaels"), the President of Independence Bank; Lachlan Foster, one of Fields' partners at Morrison & Foerster); John Hall, the president of InterRedec, Pharaon's United States company; and T.C. Huang, a representative of the Chinese sellers of

Independence Bank. BoG Ex. 138. As noted above, Shoaib received his appointment from BCCI. Michaels also received his employment offer from BCCI. TR 3,315-19 (Michaels). Shoaib recruited Foster for Independence Bank's board and, in a letter to Naqvi, describes Foster as having been "nominated by us." TR 1,993-94 (Fields); BoG Ex.138. When Huang was forced to resign from the Board of Independence Bank, BoG Ex. 138, Shoaib hoped to appoint Bruce Fane as his replacement and forwarded his resume not to Pharaon but to BCCI for approval. TR at 829-30 (Naqvi), BoG Ex. 234. After discussing Fane's candidacy with Abedi, Naqvi vetoed this appointment, leaving Shoaib to find another candidate. TR at 830 (Naqvi). Shoaib next forwarded Henrietta Holsman's resume not to Pharaon, but to Naqvi, again seeking Naqvi's approval to appoint her to Independence's board. TR at 964 (Naqvi); BoG Ex. 139. Approval was again denied and Shoaib requested Naqvi, and not Pharaon, that Donald Meller be appointed to fill the vacant position. TR at 992 (Naqvi). Neither Abedi nor Naqvi objected to this appointment and Meller was appointed. TR 992 (Naqvi). Independence Bank followed this practice for all board appointments. TR at 964 (Naqvi).

113. Abedi prevented Pharaon from appointing Lodhi to the Board of Directors of Independence Bank. Lodhi had resigned his position as an attorney for BCCI to become president of Pharaon's United States holding company. TR at 1,437-38 (Lodhi). Pharaon appointed Lodhi to the boards of all his United States companies, as he had done with Lodhi's predecessor, John Hall. TR at 1,438 (Lodhi). Unlike Hall, however, Lodhi was not appointed to the Board of Directors of Independence Ban. TR at 1,4438 (Lodhi), 3,400-01 (Hall). Pharaon explained to Lodhi that Abedi prevented him from appointing Lodhi to Independence Bank's board, supposedly because Lodhi had reported to Shoaib at BCCI and would feel uncomfortable reporting to Lodhi at Independence Bank. TR at 1,438-39, 1,460-61

(Lodhi). It should be noted to the contrary that Shoaib, as chairman of Independence Bank, would not have reported to Lodhi at Independence Bank if Lodhi had become a member of the Board.

114. BCCI also controlled the appointments of senior officers at Independence Bank. After BCCI's rejection of Fane as a Director, Shoaib proposed that Fane become a senior officer at Independence Bank. TR at 966-67 (Naqvi); BoG Ex. 222. Fane interviewed with Abedi, but again was rejected by BCCI. TR at 3,369-70 (Michaels); BoG Ex.108. Chan, who served as Shoaib's assistant in his position as chief executive officer, and Michaels, who served as Independence Bank's president, received their job offers from Lodhi while he was still a BCCI employee. TR at 2,065 (Chan), 3,315 (Michaels).

115. Shoaib requested that several other BCCI employees, or persons associated with BCCI, be assigned to work at Independence Bank. TR at 797, 941-44 (Naqvi); BoG Exs. 108, 225. Shoaib first asked that two BCCI officers working in Miami, and an officer of NBG, be made available to Independence. TR 941-44 (Naqvi); BoG Ex. 108. Later, Shoaib requested that BCCI assign Helmy, the BCCI employee who had assisted in the Independence acquisition, to Independence Bank. TR at 797-98 (Naqvi). Because Abedi hoped to avoid creating a cadre of officers at Independence Bank loyal to Shoaib personally, he refused Shoaib's requests. TR at 943-44 (Naqvi). Although Abedi wanted to maintain good relations with Shoaib, he did not want him to develop a center of power at Independence Bank. TR at 977, 983-84 (Naqvi).

2. Providing funding

116. BCCI controlled Independence Bank's finances. Between October 1, 1985, when BCCI acquired

Independence Bank, and the closing of the Bank, Independence required and received at least three injections of capital. As with the acquisition financing, all of the funds used for the injections were provided by BCCI, and none by Pharaon.

117. In November of 1987, Shoaib wrote Naqvi advising him that Independence Bank required $7.5 million in additional capital. TR at 818-20 (Naqvi); BoG Ex. 242. Attached to Shoalb's note was a letter to Pharaon asking him to arrange the capital increase. The covering note to Naqvi asked Naqvi to forward the proposal to Pharaon only after Naqvi had approved it. TR at 818, 845-46 (Naqvi).

118. BCCI responded to Shoaib's request for $7.5 million by providing capital in two segments, one of $3.5 million and another of $4 million. Late in December of 1987, Shoaib asked for the promised $3.5 million increase and received it before year-end. TR at 843-48 (Naqvi); BoG Ex. 254. Naqvi determined that it would be preferable to utilize a portion of the proceeds from the sale of the NBG shares that BCCI owned beneficially to pay this expense, rather than create additional loan accounts in Pharaon's name. TR 841, 848 (Naqvi). As discussed above, BCCI had already paid Pharaon in full for his 50 percent interest in NBG. TR at 769 (Naqvi), 2,630-31, 2,827-28 (Imam). In funding the capital increase from these NBG proceeds, BCCI was using its own funds, and not those of Pharaon, to increase Independence Bank's capital. TR at 841 (Naqvi), 2,631, 2,827-28 (Imam).

119. To effect the capital increase, Imam issued instructions to BCCI Overseas to credit the account of BCCI's Los Angeles office for $3.5 million. TR at 850 (Naqvi), 2,630-31 (Imam); BoG Ex. 257. Pursuant to Naqvi's instructions, Imam then instructed BCCI's Los Angeles agency to make the $3.5 million available to

Independence. TR at 852 (Naqvi), 2,628-31 (Imam); BoG Ex. 260.

120. Early in 1988, BCCI paid the $4 million portion of the promised $7.5 million capital increase in a similar fashion. Also in similar fashion, Shoaib requested the remainder of the capital increase from Naqvi in March of 1988. TR at 881-886 (Naqvi); BoG Ex. 279 At Naqvi's direction, Imam sent the funds to Independence Bank from a BCCI non-recourse loan account in Pharaon's name. TR at 881, 883 (Naqvi), 2,632-33 (Imam). Following Imam's instructions, BCCI's Bahrain office disbursed the loan proceeds to Independence. TR at 888-90 (Naqvi), 2,632-33 (Imam); BoG Ex. 286.

121. BCCI provided Independence with a third capital increase at approximately mid-year 1989, this time of $10 million. TR at 911 (Naqvi). Because of a mid-year audit, Naqvi did not want BCCI's books to reflect an additional loan outstanding to Pharaon. TR at 911-12, 915 (Naqvi). BCCI arranged for a short-term advance from BAII to Pharaon, the proceeds of which were disbursed to Independence Bank and recorded as an additional capital contribution, and BCCI repaid BAII soon thereafter. TR at 912-13, 917-20 (Naqvi).

122. On this unusual loan, BAII sought a guarantee that BCCI, rather than the nominal borrower, Pharaon, would repay the advance. TR at 814-16 (Naqvi); BoG Ex. 312. BCCI provided the requested guarantee to BAII on July 17, 1989, and, as it had with the loan from the Bank of Boston to Pharaon, paid the interest on the advance. TR 919-20 (Naqvi); BoG Ex. 316. In a hand-written note, Pharaon directed Zavahir to contact Imam at BCCI and demand that he arrange for BAII's repayment. TR at 911-12 (Naqvi), 2,635-36 (Imam); BoG 308 at 1,505. Imam complied with Zavahir's instructions. BCCI repaid BAII "triangularly,"

using the proceeds of a non-recourse loan in Pharaon's name. TR at 925 (Naqvi), 2,636-37 (Imam); BoG Ex. 531.

123. Pharaon knew that BCCI provided the funds used for each of Independence Bank's capital increases. Pharaon confirmed the balances in the non-recourse loan accounts used to fund the capital increases, and demanded and received "comfort letters" from BCCI indicating that he was not liable for repaying these advances. TR at 892-93 (Naqvi). In addition, Pharaon's handwritten note clearly shows his awareness that BCCI would be responsible for providing Independence Bank with capital. BoG Ex. 308 at 1,505.

3. Controlling strategic policy

124. The decision not to form a holding company for Independence Bank illustrates BCCI's control over Independence. Where a single individual owns a bank, tax considerations generally mandate the formation of a holding company. TR at 1,768-70 (Fields). Placing Independence Bank within a holding company would have allowed its owner to transfer the acquisition debt to the holding company and avoid double-taxation by servicing the acquisition debt with the bank's pre-tax earnings. In contrast, an individual owning a bank directly must service this debt with dividends received from the bank, which are taxed both at the corporate level and at the personal level. Clearly, formation of a holding company would have had significant income tax benefits for Pharaon as an individual owner. Additionally, forming a holding company could have had estate tax benefits for Pharaon as an individual, which were not of any value to a corporation.

125. Both BCCI's corporate interests and Shoaib's personal ambitions, and not those of Pharaon, dictated that a holding company not be formed. At BCCI's expense,

Shoaib had investigated the possibility of creating a holding company. TR at 2,55051(Imam); BoG Exs. 111, 39 at 2,135. Originally, Shoaib lobbied BCCI for permission to form a holding company, TR at 932-34 (Naqvi); BoG Ex. 85, but reversed his position upon learning that, under Federal Reserve supervisory policies, Independence Bank would be prohibited from engaging in real estate joint ventures in a holding company structure. TR at 995-96, 1,360-61 (Naqvi); BoG Ex. 250. Shoaib hoped to generate substantial profits at Independence Bank, partly through large investments in these real estate joint ventures. TR at 998-1,001 (Naqvi). Though originally interested in just such extraordinary profits to offset its extraordinary losses, the interjecting of the additional capital that the Federal Reserve would require in a holding company structure was not the desire of BCCI, TR at 960 (Naqvi), if not also beyond its means. In addition, since BCCI's restructuring plan was to eventually merge Independence Bank into BCCI, S.A., it saw no benefit in creating a holding company and refused to do so prior to that point. TR at 1,003 (Naqvi).

126. BCCI also restricted Shoaib's efforts to expand Independence Bank. Shoaib hoped to increase Independence's asset base from $220 million to $1 billion. TR at 787, (Naqvi), 3,320 (Michaels), 2,066 (Chan), 1,888-89 (Fields). He wrote to Abedi explaining his goal. TR at 792-93 (Naqvi); BoG 223. According to Shoaib, a bank with assets of over $1 billion would command a premium when sold. TR at 804 (Naqvi), 3,320 (Michaels). This would be in compliance with the portion of Abedi's plan for a rapid replacement for capital losses, but unbeknownst to Shoaib, Naqvi and Abedi did not intend to sell Independence Bank at a premium, as they had done with NBG, but instead planned to merge BCCI, S.A. with Independence Bank in order to make the Federal Reserve BCCI's new home country supervisor to satisfy the Basle Concordat. TR at 787, 804-05 (Naqvi).

127. Naqvi and Abedi allowed Shoaib to investigate several smaller potential acquisition targets. TR at 787 (Naqvi). Almost immediately after the Independence transaction closed, Shoaib attempted to purchase the American Asian Bank for Independence Bank. Saubolle had sent a letter to BCCI indicating that the American Asian Bank would be a good match for Independence Bank, complementing Independence Bank's Los Angeles operation with a San Francisco presence. TR at 2,475-65 (Saubolle), 788-90 Naqvi); BoG Ex. 82. Shoaib responded from Independence Bank and asked Saubolle to pursue the matter. TR at 2,477 (Saubolle), Chan, also at Independence Bank, and Fields, commenced work on the acquisition. TR at 2,077-78 (Chan), 1,859-66 (Fields). Independence and American Asian Bank negotiated a purchase agreement in December of 1985, and BCCI officers came from London to perform the required due diligence inspection. TR at 2,077-78 (Chan).

128. Despite Shoaib's eagerness, however, Independence Bank did not consummate the American Asian Bank acquisition. Saubolle, awakened by an early morning telephone call while traveling in China, was told that Pharaon was out of money and the sale could not proceed. TR at 2,477 (Saubolle).

129. Other considerations and testimony lead to the conclusion that it was Abedi who aborted the American Asian Bank acquisition. TR at 790-91 (Naqvi). With assets of $200 million, about the same size as Independence Bank, American Asian Bank was too large for Independence to absorb easily. Because BCCI's interest was not in expanding Independence Bank and then selling it, Abedi decided that American Asian Bank was simply not worth the expense. TR at 787, 789-92 (Naqvi).

130. Shoaib also actively pursued the acquisition of Commerce Bank, another California bank. Shoaib approached Naqvi, who told him that Abedi, who was unavailable at the time, would make any decision about a merger. TR at 806-10 (Naqvi). He advised Shoaib to investigate the matter, so as to be in a position to move quickly should Abedi grant his consent. TR at 807 (Naqvi). As he had with American Asian Bank, Fields worked on the transaction and successfully negotiated a letter of intent with the sellers. TR at 1,896-98 (Fields), 806-10 (Naqvi). The purchase was not consummated, however, as Abedi did not wish to expand Independence and refused to permit Shoaib to do so. TR at 787, 790 (Naqvi), 1,898 (Fields).

4. Decreasing domination by BCCI

131. As an overview, it will be seen that, engrossed in resolving its own problems, BCCI exercised a diminishing influence upon Independence Bank's affairs beginning early in 1988. Several of BCCI's employees, most prominently Shoaib, threatened to disclose BCCI's multiple improprieties unless they were paid blackmail. Further, BCCI's founder and charismatic leader, Abedi, suffered a massive heart attack in February of 1988 and was never able to return to work. Then, in October of 1988, the United States Department of Justice indicted several BCCI officers and employees for money laundering. Next, BCCI's extraordinary losses, now amounting to several billion dollars, became increasingly difficult to conceal from its external auditors.

132. Early in 1988, Shoaib informed Naqvi that he had submitted a statement to his solicitors explaining how BCCI had misappropriated $2 billion, which BCCI managed through ICIC Investments, belonging to Sheik Zayed for its own purposes. TR at 853-54 (Naqvi). Shoaib threatened to disclose this statement if BCCI did not pay him $3.6 million

by a certain date. TR at 854 (Naqvi). Naqvi arranged for Abedi to meet with Shoaib, who was still working at Independence Bank in California, at a hotel during a planned trip to New York City in the first week of February, 1988. After reviewing a sampling of Shoaib's documents, Naqvi escorted Shoaib to Abedi and presented Abedi with Shoaib's proof. TR at 854-55 (Naqvi). In Naqvi's words, Abedi literally "turned blue." TR at 855 (Naqvi). Abedi instructed Naqvi to return the documents and pay Shoaib the funds demanded. Abedi returned to London that same day, and left for Pakistan two days later to meet with the Ruler of Abu Dhabi. TR at 8565-57 (Naqvi). While in Pakistan, he suffered a massive heart attack from which he never fully recovered. Naqvi arranged for Shoaib's payment, which was made partly in cash and partly through a wire-transfer to a numbered Swiss bank account. TR at 857-558 (Naqvi).

133. Abedi could not return to work and BCCI's board of directors offered Naqvi the position as chief executive officer. TR at 96-97 (Naqvi). Naqvi first declined, but reversed his decision upon considering that, in his opinion, the bank would likely collapse if he did not accept. Naqvi's plan was to remain with BCCI in an attempt to resolve their internal problems. At this point, Naqvi's major concern was restoring confidence in BCCI and stemming the runoff in BCCI's deposits. TR at 1,006 (Naqvi).

134. The internal problems Naqvi faced were severe. In addition to Shoaib, other BCCI employees threatened Naqvi with disclosure of financial irregularities, including BCCI's relationship with Pharaon though not relating to Independence Bank. TR at 307-08, 1,158-63 (Naqvi). In total, BCCI paid about a dozen employees a total of $50 million, exacerbating BCCI's ailing financial condition. TR at 1,159.

135. To address these problems, in October of 1988 Naqvi called an extraordinary meeting of BCCI's senior management in London to outline his plans for BCCI's future. TR at 1,006 (Naqvi). During the meeting, Naqvi was interrupted and informed of still another problem-- that officials in the United States had seized BCCI's Tampa and Miami offices and arrested several BCCI employees on charges of money laundering. TR at 1,006-07 (Naqvi). This law enforcement action generated enormous adverse publicity with severe consequences. TR at 1,009 (Naqvi). Naqvi again contacted BCCI's major depositors, but BCCI lost deposits totalling approximately $1 billion, though it managed to survive. TR at 1,010 (Naqvi).

136. During the following year, Naqvi was required to devote a large portion of his time to dealing with bank supervisors, establishing anti-moneylaundering procedures, and generally responding to the criminal indictment. TR at 1,011-12 (Naqvi). Further, to a certain extent, the plan of later obtaining approval of Federal Reserve approval to become a bank holding company and moving its regulatory home to the United States was abandoned. TR at 1,371 (Naqvi).[19]

137. In addition, BCCI had made no progress toward eliminating its extraordinary losses, and by 1989, had lost more than the full total of its capital. Naqvi feared that the increased regulatory attention on BCCI generated by the Tampa indictment might reveal BCCI's precarious financial condition, which until that point had remained undisclosed. TR at 1,013 (Naqvi).

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[19] Naqvi's precise testimony was an equivocal statement that BCCI gave up hope of the move "in a way." The extent of this "way" was not further disclosed.

138. Early in 1990, Naqvi turned his attention toward a final resolution of BCCI's financial problems, which had reached crisis proportions. TR at 1,013-14 (Naqvi). In March of 1990, BCCI's external auditors refused to sign its 1989 balance sheet without a significant infusion of new capital. Abedi's stated plan had been to transfer control of BCCI to the Ruler of Abu Dhabi once its financial condition had stabilized. TR at 1,014 (Naqvi). This was a more than ambitious plan, but Naqvi prevailed upon the ailing Abedi to use his influence with Abu Dhabi's Ruler and convince him to rescue BCCI. TR at 1,016-17 (Naqvi). Upon his having done so, Abedi returned to Pakistan, leaving it to Naqvi to complete the process.

139. A major detail involved funds missing from the investment account of the Ruler of Abu Dhabi. Naqvi told Abu Dhabi's government officials that $2 billion had already been drawn from the personal investment account of Abu Dhabi's Ruler to cover a portion of BCCI's losses. TR at 1021 (Naqvi). He also explained that unless BCCI received a firm commitment to supply at least another $1 billion of capital into BCCI, the external auditors would not sign the year-end 1989 balance sheet and the Luxembourg regulators would likely take action to close the bank. TR at 1,027, 1,032 (Naqvi).

140. After extorting for himself alone almost $4 million from BCCI, Shoaib had resigned as chief executive officer of Independence Bank since, in the words of his assistant, he knew "the game was about to be over" with BCCI and wanted to get out. TR at 2,102-03 (Chan). Naqvi, who had little time to devote to th; bank, informed Pharaon that Shoaib was leaving, and Pharaon told Naqvi that he had identified a potential replacement for Shoaib, one Fulvio Dobrich ("Dobrich"), a former Manufacturers Hanover officer. Pharaon sent Dobrich to London to meet with Naqvi. Naqvi spent little time talking with Dobrich, whose

main concern was obtaining BCCI's assistance in dealing with the multiple inauspicious joint venture real estate investments that Independence Bank had made under Shoaib.

141. Dobrich received Pharaon's offer to manage Independence Bank the day after he was relieved of his responsibilities and resigned from his former position at Manufacturers Hanover. TR at 3,250 (Dobrich). He flew to Amsterdam to meet with Pharaon and after discussing the proposal, reviewing confidential federal and state examination reports, and meeting with Independence Bank's management, Dobrich accepted the position of chairman. TR at 3,256 (Dobrich).

G. CLOSING OF BCCI AND OF INDEPENDENCE BANK

142. BCCI was closed by a multinational action of bank regulatory authorities on July 5, 1991. TR at 1,075 (Naqvi). Naqvi was arrested in September, 1991. Independence Bank continued to require additional capital, which Pharaon would not supply. TR at 1,935-36 (Fields), 3,278-79 (Dobrich); BoG Ex. 348. Independence Bank became insolvent and was closed by the California Banking Superintendent, and taken over by the Federal Deposit Insurance Corporation as receiver in January of 1992. TR at 2,103 (Chan).

143. Under Shoaib's leadership, Independence had embarked on numerous real estate joint ventures. TR at 3,279-80 (Dobrich). These joint ventures led to large losses and a continuing need for additional capital. TR at 1,935-36 (Fields).[20]

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[20] As a result of Michaels' activities as President of Independence under Shoaib, and the bank's extensive unsafe

(continued...)

144. Pharaon urged BCCI to take responsibility for Independence's bad loans. His legal advisors suggested establishing a new company that would purchase the joint venture assets with funds borrowed from BCCI. TR at 1,369-70 (Naqvi); BoG Exs. 335, 3238. Pharaon publicly committed to the United States bank supervisors that he would maintain adequate capital at Independence Bank, but privately resisted doing so without BCCI's money. TR at 1,062 (Naqvi), 3,334 (Michaels). There is no indication that Pharaon contributed any sums to Independence Bank's capital fund.

145. BCCI's new principal shareholder, the Ruler of Abu Dhabi, had replaced Naqvi as chief executive officer, and he continued at BCCI only in an advisory capacity. TR at 1,044-45 (Naqvi). The new management avoided any direct involvement with Independence Bank. TR at 1,060 (Naqvi). Although it was willing to lend funds for the creation of a new corporation to relieve Independence of its bad debts, BCCI's new management insisted on a personal

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[20](...continued)
and unsound real estate transactions apparently made in compliance with Abedi's plan to recoup capital lost, the FDIC instituted a proceeding against Michael's seeking to prohibit him from further participation in the affairs of any Federally insured depository institution. Following Michael's failure to respond to FDIC's Notice, failure to respond to FDIC's motion to declare him in default of answering, and failure to respond to the Administrative Law Judge's Order to Show Cause why he should not be found in default, the Administrative Law Judge submitted a Recommended Decision to the FDIC that the motion be granted and Michaels be so prohibited. The recommendation is currently awaiting consideration by FDIC's Board.

guarantee from Pharaon before doing so. TR 1,060-64 (Naqvi); BoG Ex. 336 at ¶ (e); GRP Ex. 129A at Tab 4.

146. In October of 1990, Pharaon learned that BCCI intended to disclose the Acquisition Agreement to United States bank supervisors. TR at 2,663-64 (Imam). He immediately demanded an accounting of the proceeds of the sale of the shares of NBG, which had taken place almost five years earlier. TR 1,048-49 (Naqvi). Pharaon declared that the accounting would support his claim that the proceeds from the sale was utilized to purchase Independence Bank. BoG Ex. 339. The fact is, however, that Pharaon already knew, from the report of his own accountant, how his share of the sale of NBG shares had been disbursed. BoG Ex. 598.

147. BCCI did not provide Pharaon with any information and he wrote again, this time to Zafar Iqbal, Naqvi's replacement. TR at 1,082 Naqvi); BoG Ex. 542A. The letter requested a detailed accounting of what he characterized as the non-recourse loans made to him by BCCI, and stated that the majority of his loan portfolio consisted of these non-recourse loans, which were secured by the shares of various companies and other assets. Pharaon further indicated that he had received assurances annually from BCCI that he would not be held accountable for the repayment of these loans or the accrued interest. Pharaon demanded a meeting with BCCI's new management to discuss the matter openly. BoG Ex. 542A.

148. Pursuant to this request, Pharaon met with Naqvi in March of 1991. TR 1,086-87 (Naqvi). At the meeting, Pharaon argued that BCCI had cheated him when he sold his shares of BCCI Holdings. Pharaon claimed that he should have received $40 per share for the BCCI Holdings shares he sold in December of 1985, rather than the $95 million fixed sum, amounting roughly to $22 per share which he actually

received. TR at 1,089-91 (Naqvi); BoG Ex. 545 at ¶ 2. Pharaon's position was that he thought the amount he should have received a long period of time prior to the purchase of Independent Bank, as opposed to the amount which he actually had received, would have been sufficient for him to have purchased the bank without the use of non-recourse loans at the subsequent time when the purchase was consummated. He claimed that the information he had provided to the United States banking supervisors had been given on such a basis. Naqvi believed that Pharaon was more concerned with determining what information had passed from BCCI to the United States supervisors than with obtaining additional funds from BCCI. TR at 1,094-95 (Naqvi); BoG Ex. 545 at ¶ 4.

149. Naqvi reminded Pharaon that he had been paid a flat sum of $95 million for his BCCI Holdings shares, which was determined on the basis of the large block of shares being sold, the lack of available purchasers of BCCI shares, the substantial profit Pharaon would earn on a sale at this price, and that the share price was a generous multiple of 1.6 times BCCI's book value. TR at 1,090-91 (Naqvi); BoG Ex. 545 at ¶ 3. Given that BCCI Holdings actually had no capital available, any price was higher than book value. Convinced that BCCI would no longer provide him with funds to keep Independence Bank afloat, Pharaon disavowed any responsibility for Independence's finances soon after this meeting. TR at 3,278-79 (Dobrich); BoG Ex. 378.

H. BCCI'S AND PHARAON'S REPRESENTATIONS TO PETITIONER CONCERNING OWNERSHIP OF INDEPENDENCE BANK

150. Between 1986 and 1990, BCCI submitted to the Federal Reserve annual reports, known as Y-7s from the designation of the form upon which submitted, detailing its operations for the preceding calendar year. TR at 111-14

(Naqvi); BoG Exs. 553 through 557 inclusive. As part of each report, BCCI was required to disclose the names of any bank in the United States in which it owned or con-trolled, either directly or indirectly, more than five percent of the voting shares. On each report, despite its beneficial interest in Independence Bank, BCCI falsely indicated that it had no such ownership interests. This information was intentionally falsified to mislead the Board as to Independence Bank's true ownership. TR at 1,109-12 (Naqvi).

151. Pharaon knew that BCCI filed such reports. As the nominal 100 percent owner of NBG through a holding company, Pharaon was familiar with these forms, as he was required to and did file similar annual reports with the Board, which he personally signed. BoG Exs. 638, 639. Further, Pharaon participated in BCCI's falsification of records by asserting in his own filings with the Federal Reserve that he was the 100 percent owner of Independence, and by asserting in his applications both to the California Superintendent of Banks and to the FDIC that it was he who would own Independence Bank. BoG Exs. 638 at 44, 639 at 30.

I. PHARAON'S FINANCIAL CONDITION

152. Pharaon is described as an astute and shrewd businessman, who devotes considerable attention to detail. TR at 165-66 (Naqvi). As demonstrated in this proceeding, he has netted more than $150 million from his investments in shares of both BCCI Holdings and NBG, and made millions of dollars from his other business ventures in the United States. TR at 3,418 (Hall).

153. In 1985, Pharaon admitted under oath to a net worth in the vicinity of half-a-billion dollars, BoG Ex. 584 at 3,303, line 15, and that his annual income at this time was over $20 million. BoG Ex. 584 at 3,303. He owns several

airplanes of the larger passenger variety, a large yacht, and apartments in London, Paris, and the Middle East, as well as the former Henry Ford plantation in Georgia, on the grounds of which sits an 18-hole golf course. TR at 1,439-40 (Lodhi), 2,828 (Imam), 171 (Naqvi), and 2,291-92 (Dickerson).

154. There has been a predispositional seizure of some $37 million in assets within the United States said to belong to Pharaon, presently in the hands of a Receiver or Trustee, as to which there is some dispute in the courts regarding actual ownership.

IV. DISCUSSION AND CONCLUSIONS

A. OVERVIEW

The principal force behind the transactions involved in this proceeding was Abedi, and his vision of a world-wide banking entity. Problems began when this world-wide banking entity, referred to herein as BCCI, experienced huge losses, which Abedi chose to hide in an attempt to recoup the damage. His attempts to recover his losses were complicated by the necessity of finding a new "home country" banking supervisor. Abedi decided that the new "home country" should be the United States. The bank to be acquired in the United States would serve as a shelter to encompass the various BCCI institutions located in 70 different countries. An alternative purpose for the bank acquisition was for a turn-around sale of the institution at a great profit to offset BCCI's hidden losses. While it is not certain which of these purposes was the principal one in the Independence Bank acquisition, BCCI could not attempt to acquire the bank in its own name in circumstances which might make public the extent of its losses.

The option utilized was one which had served BCCI well in the past, which was to utilize a nominee owner, funded by BCCI but with financial credentials to have qualified as a true owner. Such an individual had to be compensated in some manner, by providing him with some portion of actual ownership to share in the expected rapid and generous profits, and such banking services as he could not obtain elsewhere. Pharaon was such an individual -- with reported and probably actual wealth to make him appear to be the true investor-customer of the BCCI investment banking function. Pharaon had already participated in similar symbiotic arrangements with BCCI and he was well satisfied to receive extravagant profit from a portion of a business transaction which required little if any of his own financing, and none of his business supervision. Abedi decided to utilize him as a nominee in the Independence transaction.

The plan was reduced to writing. Pharaon was to be registered owner of all the stock of Independence, but actually the beneficial owner of only fifteen percent. The remaining eighty-five percent ownership was his in a fiduciary relationship, to transfer on demand to BCCI or its other designee. The funding of the acquisition was to be primarily by BCCI, through "non-recourse" loans on which Pharaon's only liability was the stock itself. All expenses were similarly funded. A majority of Independence Bank's board of directors were approved by BCCI, and senior management were provided by BCCI officers supposedly employed by Independence Bank, with major decisions subject to Abedi's personal approval.

Of course the banking supervisory authorities in the United States could not be permitted to learn of the true status of ownership on Independence Bank. The agreement between BCCI and Pharaon was kept secret. To the outside world, it was to appear that BCCI as an investment banker

had arranged a good deal for one of its more illustrious customers.

Unfortunately, schemes such as this sometimes contain the seeds of their own undoing. The great profits from Independence Bank, to come through real estate joint ventures, did not materialize, and instead greater and greater capital infusions were required and provided by BCCI through non-recourse loans to Pharaon. At the same time, the lack of monies required that Abedi misappropriate some $2 billion from its most important customer. Cracks began to appear in the foundation, and eventually banking supervisors around the world seized what was left of the BCCI empire, and the losers world-wide began to tote up their losses. All that was left was the fixing of blame, and attempting to insure that there would be no repetition of the debacle. As for Independence Bank itself, when BCCI could no longer make additional capital infusions and Pharaon had abandoned it, it failed.

Of the several proceedings in the United States arising from these circumstances, this is but one. Because the actions of BCCI and of Pharaon were in violation of several statutes, this proceeding was instituted to order a prohibition against Pharaon ever participating in the affairs of a federally insured depository institution, and to impose the statutorily mandated civil money penalty on Pharaon for his participation in the scheme.

B. CREDIBILITY ISSUES

1. Naqvi and Imam

Respondent argues that the testimony of Naqvi and of Imam should be afforded little if any weight, in that both have been convicted and incarcerated as a result of the matters involved, and that Naqvi seeks a reduction of time in

prison for cooperation with Enforcement Counsel, and Imam also seeks favorable treatment of some type.

Guilty pleas by both witnesses have indeed been entered, against Naqvi in the United States and against Imam in the United Kingdom, for crimes involved in the matters discussed herein. Both were incarcerated at the time of their testimony. Full details of terms of sentence, and conditions for reductions in sentences through cooperation are not contained in the record. Enforcement Counsel state in their Reply Brief after hearing that Imam's sentence will have been completed prior to the completion of this recommendation, and that Naqvi's term, reduction of which is said not to be dependant upon his favorable testimony in this proceeding, will be concluded shortly thereafter.

None of the above arguments and counterarguments are considered by the undersigned to be of any great importance. The undersigned does not concur with the outmoded legal concept that falso in unis, falso in omnibus, that one falsehood portends falsehoods in all statements. While Naqvi clings to the belief that his misconduct was of greater necessity, he fully understands the criminality of his former behavior and has accepted his punishment. The same acceptance has been made by Imam. This hearing required both oral testimony and documentary evidence in order to reach any conclusion. The burden of initial proof by preponderance of the evidence was on Petitioner, and the burden of going forward following a prima facie showing was on Respondent. Petitioner proved its case by the testimonial showing here attacked by Pharaon, but the testimonial showing was supported almost completely throughout by documentation. If there was any contrary testimony, in addition to that of Respondent, it was the responsibility of Respondent to produce it, and he failed to do so. If there were any documentation in refutation, much of which would perforce be in Respondent's possession

rather than or in addition to that of Petitioner, it was clear that Respondent would have been able to present it, with adequate explanation where required. In both cases, Respondent failed to do so, leaving a prima facie case of preponderant evidence unrebutted. The documentary support of Petitioner's witnesses overcomes any doubts as to the credibility of their testimony which might arise from their prior convictions and incarcerations.

2. Pharaon

Pharaon failed to testify on his own behalf. The Supreme Court has noted that "Silence is often evidence of the most persuasive character,"[21] and Enforcement Counsel seek a ruling that this establishes an inference that any testimony he might have given would have been unfavorable to him.

The rationale offered for this adverse inference resides in case law that the testimony of some individuals would potentially offer so much to the trier of fact that one would expect them to take the stand,[22] particularly where it is in their own behalf. Where it is peculiarly within the power of one party to produce such an individual, and particularly to provide the testimony himself and fails to do so, it has been ruled that the trier of fact may infer that any testimony the witness would have provided would be unfavorable to that

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[21] United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 15444, 44 S. Ct. 56 (1923).

[22] United States v. Pitts, 918 F.2d 197, 199 (D.C. Cir. 1990) (citing Graves v. United States, 150 U.S. 118, 120-21, 14 S. Ct. 40, 41 (1893)).

party.[23] Such an inference in the civil context does not violate a party's Fifth Amendment right against self-incrimination.[24] It is argued that as a party to the Acquisition Agreement and a participant in all of the significant events at issue in this case, Pharaon potentially could have offered much to assist the trier of fact, that the ability to produce Pharaon at this proceeding was peculiarly within Pharaon's own power, so that the trier of fact should draw a negative inference from his failure to testify.

As is a matter of record herein, though not specifically in the hearing, there are several Federal criminal indictments outstanding against Pharaon, from which he is a fugitive, and his appearance at either a deposition, as requested, or at the hearing, in all probability would result in his arrest. Pharaon offered to appear outside of the United States for a deposition, but insisted that it be in a country subject to Muslim law, and the parties were unable to agree on a location. In motion practice, the undersigned ruled that he would not accept a telephone or video deposition because of the significance of credibility in this matter and the importance of visual observation of witnesses in the Administrative Law Judge's credibility rulings, to which the Board gives special deference.[25] The details of the

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[23] United States v. Myerson, 18 F.3d 153, 158 (2d Cir. 1994); United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988).

[24] Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551 (1976).

[25] In the Matter of Interamericas Investments Ltd. and Peter Ulrich, Fed. Res. Bd. Docket No. 94-064-B-HC, Final Decision, slip pages 23-24 (April 9, 1996), citing In the

(continued...)

undersigned's ruling are contained in the Order, which is part of the record herein.

3. Other witnesses

The testimony of other witnesses is sometimes at variance with that of Imam and Naqvi. While many of these other witnesses may generally be credible, the testimony they provided was hearsay, provided by Abedi or Pharaon, the two principal architects of this massive fraud. The main purpose of this hearsay or failure to provide information was to secrete the true state of affairs. Thus, for example, when Lodhi, Helmy or Saubolle would tell Fields that he was Pharaon's attorney, this statement was provided to the witness by or at the direction of Abedi or Pharaon himself, and was contradicted by the failure of the supposed client to provide information necessary for Field to accomplish his supposed representation. Where the testimony contradicts either the firsthand knowledge of Naqvi and Imam, or contradicts the supporting documents or actions, the undersigned credits the first-hand and/or the otherwise supported testimony.

C. VIOLATION OF SECTION 3(a) OF THE BHC ACT

1. Statutory provisions

Section 8(b)(5) of the BHC Act, 12 U.S.C.A. § 1847(b)(5) (West 1989). Section 8(b)(5) reads:

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[25](...continued)
Matter of Preston J. Brooks, OCC No. AA-EC-91-154 (August 6, 1993) at 9 - 10, and In the Matter of James L. Maqee, 78 Fed. Res. Bull. 968, 969 (December 1992).

> For the purposes of this section [on civil money penalties], the term "violate" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation."

Section 8(b)(5), which superseded 12 USC § 1847(b)(1) (1982), simply re-codified language previously appearing in the BHC Act.

Section 3(a) of the BHC Act, 12 U.S.C. § 1842(a), provides in pertinent part that:

> [i]t shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company, ... [or] (3) for any bank holding company to acquire direct of indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank ...

The definition of "control" is defined at Section 2(a)(2) of the BHC Act, 12 U.S.C. § 1841(a)(2), as follows:

> Any company has control over a bank or over any company if--
>
> (A) the company directly of indirectly or acting through[26] one or more other persons owns, controls, or

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[26] The "acting through" language was added to the statute but, as stated by the Supreme Court in United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 109 (1975), [E]ven before its scope was expanded in 1970, § 1842(a) was

(continued...)

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[26](...continued)
concerned with more than the literal 'acquisition' of stock and the control of boards of directions 'in any manner' by bank holding companies." As further noted by In the Matter of Interamericas Investments Ltd. and Peter Ulrich , Fed. Res. Bd. Docket No. 94-064-B-HC, April 9, 1996, slip pages 19-20:

> . . . Either the "indirectly" phrase or the "acting through one or more other persons" phase, or both taken together, would reach the situation where an individual holds shares of a bank or a company, not in his own right, but for the benefit of a company. The principle that attributes shares nominally held by an individual ... to a company ... in appropriate circumstances requires no semantic stretch, but merely gives the language of the statute its plain meaning.

> Even if it were necessary to look past the plain language, an examination of the legislative history of the statute demonstrates that Congress intended "indirect control" to reach circumstances such as those presented here. As the Administrative Law Judge observed in the Recommended Decision, Congress in the 1966 amendments to the BHC Act has "because of indirect dominance deemed a company to be in control of bank shares in order to avoid the practical and procedural problems inherent in proving actual control." (RD at 58, citing Committee on Banking & Currency, 89 Cong., 1st Sess., Amendments to the Bank Holding company Act of 1956: Analyses of S. 2353, S. 2418, and H.R. 7271 at 8-9)." Thus, the Administrative Law Judge concluded, "Congress decided that under appropriate circumstances a company may still be a bank holding company on the

(continued...)

has power to vote 25 per centum or more of any class of voting securities of the bank or company;

(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

Section 11(a) of the Board's Regulation Y implements this statutory provision by requiring a prior application to the Board for the formation of a bank holding company. 12 CFR § 225.11(a).

As indicated below, it has been established that BCCI controlled Independence Bank through its control of ICIC,[27]

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[26](...continued)
basis of bank shares that the company does not own directly and regardless of whether actual control is proven, where indirect control is shown by the entirety of the facts." (RD at 58.) The Board agrees that this case presents those "appropriate circumstances" where the entirety of the facts shows indirect control and that, therefore, the company exercising that indirect control is to be deemed a bank holding company within the meaning of the BHC Act.

[27] Again, the BCCI Group consists of BCCI Holdings, and its direct subsidiaries, including BCCI, S.A. and BCCI Overseas.

which, in turn, controlled Independence Bank. It has also been established that through its ability to retake full title to at least 85% of the voting stock, BCCI controlled more than 25 percent of the v-sting shares of Independence. It has also been established that BCCI controlled the appointment of a majority of Independence's directors. Any one of these factors, standing alone, would be sufficient to render BCCI a bank holding company under Federal law.

2. BCCI controlled Independence through ICIC Overseas

In terms of the provisions of the BHC Act, BCCI controlled the ICIC Staff Benefit Trust, a trust formed to benefit its employees. The ICIC Staff Benefit Trust in turn controlled ICIC Holdings, 50 percent of the shares of which were held by BCCI employees in a fiduciary capacity for the Trust. ICIC Holdings controlled its wholly-owned subsidiary, ICIC Overseas, which in turn controlled Independence Bank of which 85 percent of the shares were held for it in an undisclosed fiduciary capacity by Pharaon. In short, by virtue of BCCI controlling ICIC, which in turn controlled Independence Bank, BCCI also controlled Independence Bank.

a. BCCI controlled the ICIC Staff Benefit Trust[28]

Shares held by a trustee for the benefit of a company's employees are controlled by the company.[29] The ICIC Staff Benefit Trust was a trust organized to provide benefits for the employees of BCCI. Under Section 2(g)(2)(C) of the BHC Act, 12 U.S.C. §1841(g)(2)(C), the BCCI thus controlled the ICIC Staff Benefit Trust. It also controlled any shares that the ICIC Staff Benefit Trust controlled.[30]

b. The ICIC Staff Benefit Trust controlled ICIC Holdings

Section 2(g)(2)(A) of the BHC Act, 12 U.S.C. § 1841(g)(2)(A) provides that shares held in a fiduciary

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[28] BCCI Group's control over ICIC is not a requirement in demonstrating Pharaon's violation of the BHC Act. Absent control by the BCCI Group, ICIC through ICIC Overseas clearly obtained control over the Independence Bank through the Acquisition Agreement without obtaining the prior approval of the Board, as discussed below.

[29] Section 2(g)(2)(C) of the BHC Act, 12 U.S.C.A. § 1841(g)(2)(C).

[30] Pauline B. Heller, Federal Bank Holding Company Law at 1-46 [§ 1.03[2][ii] (citing Senate Committee on Banking and Currency, 89th Cong., 1st Sess., Amendments to the Bank Holding Company Act of 1956: Analyses etc. 9 (Comm. Print 1965)); Section 2(g)(1) of the BHC Act, 12 U.S.C.A. § 1841(g)(1), that shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company.

capacity for a company are controlled by that company. The ICIC Staff Benefit Trust, as a business trust, is a "company" under the BHC Act.[31] Three BCCI officers held all the shares of ICIC Holdings in a fiduciary capacity, one half for the benefit of the ICIC Foundation, the other half for the benefit of the ICIC Staff Benefit Trust. The Trust controlled the shares held for it in a fiduciary capacity. Therefore, because the Trust controlled more than 25 percent of its shares, the Trust also controlled ICIC Holdings.[32]

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[31] Section 2(b) of the BHC Act, 12 U.S.C. §1841(b); First Nat'l Bank of Blue Island ESOP, 71 Fed. Res. Bull. 804 (Oct., 1985), aff'd 802 F.2d 291 (7th Cir. 1986) which held that a trust organized to benefit employees is a business trust and a company under the BHC Act.

[32] It might also be argued that BCCI controlled ICIC. Under the BHC Act, one company controls another if, acting through one or more persons, it controls or has the power to vote 25 percent or more of the company's shares. Two of the three shareholders of ICIC Holdings were senior executive officers of the BCCI. They took their direction from Abedi, BCCI's founder and chief executive officer. Because BCCI had the ability to direct the owners of more than 25 percent of ICIC Holdings' stock as to how to manage ICIC Holdings, BCCI controlled ICIC Holdings and its subsidiary, ICIC Overseas. Section 2(a)(2)(A) of the BHC Act, 12 U.S.C.A. § 1841(a)(2)(A). Compare Order Relating to Control Over Financial General Bankshares Inc., 63 Fed. Res. Bull. 1106, 1109-1110 (Dec. 1977), which disregarded a corporation's separate identity where its affairs were dominated by a second corporation, and attributing to the dominating corporation control of 25 percent of the dominated corporation's stock.

BCCI intentionally dominated the affairs of ICIC Holdings and its subsidiaries. Naqvi, the eventual chief-executive-officer of BCCI, had a power of attorney to conduct business on behalf of ICIC Overseas. When he conducted ICIC Overseas' business, he did so to benefit BCCI. ICIC Overseas entered into the Acquisition Agreement with Pharaon, signed by Naqvi on behalf of ICIC Overseas, as a vehicle for preserving Independence Bank for merger into BCCI, S.A. The Acquisition Agreement served BCCI's purposes, and BCCI was willing to extend non-recourse credit to Pharaon to facilitate Independence Bank's purchase. To determine otherwise would disregard that at a time when it required funds to remain solvent, BCCI directed an ICIC Holdings subsidiary, ICIC Investments, to misappropriate $2 billion held for the Ruler of Abu Dhabi to BCCI. In a similar demonstration of control, BCCI prevailed upon ICIC to make a $150 million gift or "subvention" to BCCI to offset some of its extraordinary losses.

All of this evidence supports the determination that BCCI controlled ICIC and shows-that ICIC was utilized as an instrument exploited to achieve BCCI's corporate objectives.

c. ICIC Holdings controlled ICIC Overseas and Independence Bank

Through the ICIC Staff Benefit Trust, BCCI controlled ICIC Holdings, its wholly-owned subsidiary ICIC Overseas, and any other bank controlled by ICIC Overseas.[33] The

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[33] Section 2(g)(1) of the BHC Act, 12 U.S.C.A. § 1841(g)(1), provides that shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company.

secret Acquisition Agreement makes this analysis simple, because as we have seen above shares held through a fiduciary for the benefit of company are deemed to be controlled by the company.[34] According to the Acquisition Agreement, Pharaon held 85 percent of the shares of Independence in a fiduciary capacity for ICIC Overseas. Because it beneficially owned more than 25 percent of Independence Bank's voting shares, ICIC Overseas controlled Independence Bank under the BHC Act. Working up from the ladder's lowest rung, ICIC Holdings controlled ICIC Overseas under Section 2(g)(1) of the BHC Act, the ICIC Staff Benefit Trust controlled ICIC Holdings under Section 2(g)(2)(A) of the BHC Act, and BCCI controlled the ICIC Staff Benefit Trust under Section 2(g)(2)(C) of the BHC Act. Thus, BCCI controlled Independence Bank under Section 2(g)(1) and 2(a)(2)(A) of the BHC Act.

Even had the Acquisition Agreement been "rescinded" before it ever took effect, had been illegal, unenforceable and therefore a nullity, and had at best been an "option agreement" not conferring any beneficial interest in Independence's shares to ICIC Overseas, it remains undisputed that BCCI still controlled Independence through the financing arrangements it extended to Pharaon and through the ability to appoint Independence Bank's directors, as discussed below.

d. The agreement designating the nominee

The document that Enforcement Counsel refers to as the "Nominee Agreement" is at the core of this dispute. Enforcement Counsel rely heavily on this document, executed on May 17, 1985, to support its case that Pharaon

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[34] Section 2(a)(2)(A) and Section 2(g)(2)(A) of the BHC Act, 12 U.S.C.A. § 1841(a)(2)(A) and (g)(2)(A).

was merely a nominee acting on behalf of BCCI when he became the registered holder of the stock of Independence Bank. The document embodies an agreement between Pharaon and Naqvi, on behalf of ICIC Overseas, and is entitled "Acquisition of the shares of Independence Bank." Petitioner's position is that this document represents the terms and designs for acquiring Independence and that ultimately the entire transaction in reality closely followed the design.

Respondent, on the other hand, argues that the document merely represents an option by which Independence could, if later desired, be purchased by BCCI in its own or in its designee's name. In addition, Respondent asserts that the writing was neither followed nor effectuated by the parties and thus cannot be relied upon as a tacit admission that Pharaon was a nominee. The illumination provided by the banking expert witness tendered by Pharaon perhaps most clearly describes Pharaon's argument:

> Basically, ... these types of arrangements, these types of options -- I mean, I read it as an option. Am I 100 percent certain it's an option? No. But I think the fair reading of it, in my opinion, your Honor, would be its an option. It's a stakeout agreement.
>
> Basically, again, assuming, which is not the case, that it was actually carried into effect, it would give BCCI a stakeout in sort of -- it's a continuing offer to acquire an institution. That's basically what it would be, a sort of a continuing offer to acquire.

TR at 3,071.

An examination of the terms of the agreement and the intent of the parties demonstrates this is incorrect. Further, even if the nominee designation was no more than an option

agreement, it would still for the purpose of the BHC Act pass control of Independence Bank to BCCI in violation of the BHC Act.

The language of the Acquisition Agreement does not support Pharaon's argument that it was an option. Rather, the terms of the agreement provide ICIC with control over 85 percent of Independence Bank's shares. In the second paragraph, the parties agree that Pharaon holds all the shares of Independence in his own name, but that he beneficially owns only 15 percent of the shares. The third paragraph makes clear that Pharaon holds the remaining 85 percent of the shares as a fiduciary for ICIC Overseas. A true option-holder, such as BCCI is claims to have been, acquires no beneficial ownership of the shares subject to the option, but instead has only a contingent right against any other party. In this case, the "beneficial" holder, Pharaon, was a named fiduciary, and ICIC held the rights as beneficiary of the fiduciary relationship.

In the fourth paragraph, ICIC Overseas agrees to finance the purchase of the shares of Independence that it owns beneficially, not only as to interest on loans and so forth, but against any claim on Pharaon, which would include principal. The fifth paragraph allows ICIC Overseas to control the custody of the certificates evidencing ownership of these shares. The sixth paragraph entitles ICIC Overseas to any dividends received on these shares, another indicia of BCCI's ownership. The seventh paragraph gives ICIC Overseas an entitlement to purchase any rights shares that may be offered. Each of these rights is an indicia of ownership.

Pharaon refers to a short phrase in the third paragraph of the Acquisition Agreement as supporting his argument that the agreement is no more than an option. That provision reads:

> For the balance of 85% of the said shares of [Independence] Bank, ICIC [Overseas] shall have the right to purchase them at their cost price from either [Pharaon] in its own name or in the name or names of its nominee or nominees. . . ."

According to the only signer of the Acquisition Agreement to testify, Naqvi, this language simply provided a mechanism for changing the registered owner of the shares from Pharaon to ICIC Overseas or another designee when BCCI felt it appropriate to do so.

An economic analysis of the Acquisition Agreement demonstrates that the parties could not have intended to grant ICIC Overseas an option on Independence shares as opposed to a beneficiary status under Pharaon's fiduciary status. Because of the non-recourse nature of the financing of Independence Bank's shares, Pharaon would suffer no loss if the price of the shares declined in value. Because Pharaon agreed to sell the shares of Independence Bank to ICIC Overseas at cost, neither would Pharaon accrue any benefit if the price of the shares rose in value. On the other hand, ICIC Overseas, which financed the purchase of Independence Bank's shares, stood to lose if Independence Bank's shares fell in value and also stood to benefit if the shares appreciated in value. Thus, ICIC Overseas, and not Pharaon, bore all of the economic risk of ownership, another indicia that the ownership was truly fixed in ICIC and hence in BCCI.

There is ample evidence that Pharaon knew the difference between an option agreement and a nominee agreement. In 1986, Pharaon granted an option to CCAH to acquire shares of NBG. This agreement, explicitly titled "OPTION AGREEMENT," provides for a fee from the purchaser of the

option, CCAH, to the seller of the option, Pharaon.[35] It provides a date on which CCAH's option will terminate,[36] and for Pharaon's continuing control over the NBG shares until the option is exercised.[37] The agreement was not held secret, but was submitted by counsel to the Federal Reserve for approval before execution.

The Acquisition Agreement stands in stark contrast. It mentions no fee from ICIC Overseas, as the purchaser of an option, to Pharaon as the grantor of an option, provides for no termination date, and does not provide for Pharaon's control over Independence Bank until the option's exercise. The Acquisition Agreement never even mentions the word option. The Acquisition Agreement between ICIC and Pharaon serves a far different purpose than the option agreement between CCAH and Pharaon. The Acquisition Agreement evidences the intent to violate the law that the parties expected to conceal.

Moreover, even if the Acquisition Agreement were an option, it would still pass effective control of Independence Bank to ICIC Overseas as option-holder upon the agreement's execution. Under the Board's Regulation Y, a holder of an option to acquire voting shares is presumed to control those shares.[38] The Board considers options that

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[35] BOG Ex. 626 at ¶ 2.

[36] Id. at ¶ 4.

[37] Id. at ¶ 6.

[38] Section 225.31(d)(1)(ii) of Regulation Y, 12 C.F.R. § 225.31(d)(1)(ii) (1995); see also the Board's policy statement on nonvoting equity investments at 12 C.F.R. §

(continued...)

expire in less than one year not to pass control to the holder, so long as the option holder promptly applies to the Board.[39] The Board will not approve an option to acquire shares of a bank that may be exercised over a more extended period of time, or that may never be exercised.[40]

Even if one considered the Acquisition Agreement to be no more than an option, BCCI would, through the agreement, acquire control over Independence for purposes of the CBC Act. The "option" has no expiration period and need never be exercised. Further, the Acquisition Agreement provides BCCI with an immediate right to receive any cash or stock dividends issued against Independence Bank's shares.[41] Finally, under the Acquisition Agreement,

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[38](...continued)
225.143(c)(5) (1995), to the effect that one who enters into an agreement, including an option agreement, that deprives a shareholder of the right to sell, transfer or encumber his stock with the intention of maintaining the integrity of the investment or preventing takeover by others, is presumed to control the stock. Also, see 12 C.F.R. § 225.143(c)(6) (1995).

[39] Suburban Bancorp, 71 Fed. Res. Bull. 581, 583 (July 1985).

[40] CNCC Partners, 68 Fed. Res. Bull. 48, 49 n.3 (Jan. 1982).

[41] BOG 37 at ¶ 6. Compare City Holding Company, 71 Fed. Res. Bull. 575, 575-76 (July, 1985), to the effect that an option to acquire bank shares did not give the holder immediate control over the shares where the option holder had no right to receive dividends on the shares under the option.

Pharaon cannot sell or otherwise transfer the shares subject to the option. Based on these factors, BCCI controlled Independence Bank.

e. The nominee designation was modified but never rescinded

Respondent argues that he and BCCI rescinded the Acquisition Agreement, signed in May, 1985, prior to the purchase of Independence Bank in October, 1985. This argument is not supported by any evidence.

Pharaon signed the Acquisition Agreement on May 17, 1985. The Independence transaction closed the following October 1, 1986. In the spring of 1986, Pharaon met with Naqvi and Abedi in Nice to discuss the sale of his stake in NBG. At the meeting, he proposed modifying the Acquisition Agreement to increase the percentage of Independence Bank shares he owned beneficially from 15 percent to 50 percent. Abedi reluctantly agreed. Several weeks later, in June of 1986, nine months after the Independence Bank acquisition, Pharaon wrote to BCCI asking that the original understanding concerning the ownership of Independence Bank, which was that BCCI owned 85 percent and Pharaon owned 15 percent, be restored. Again, BCCI agreed. Thus, the documentary evidence, including a letter in Pharaon's own handwriting, as well as the testimony, refute the defense of rescission.

f. The nominee designation represented the agreement of the parties and was not a nullity

Pharaon also argues that the Acquisition Agreement, to the extent it allows ICIC Overseas to control Independence Bank prior to receiving the approval of the Federal Reserve to become a bank holding company, is an illegal agreement and thus unenforceable under United States law, and that

because it is illegal it is unenforceable and a nullity. The nominee designation, however, has been clearly demonstrated to be a written expression of the intent of the parties, subject to intermediate changes but never varying the intended goal. The point here is that the nominee designation is in fact evidence of the intent of the parties, and that this intent remained constant throughout the variances to the agreement later made by the parties.

The Board evaluated the significance of a similar illegal agreement in Florida National Banks of Florida, Inc.[42], in which a bank holding company lent several of its retired officers funds required to purchase just over 50 percent of the shares of an unaffiliated bank. Concurrently, Florida National agreed with the retirees to purchase the bank's shares at a later time. Through the agreement, Florida National indemnified the retirees against any risk arising from the purchase of the bank's shares. Further, it was impossible for the retirees to profit through the transaction.[43] Florida National later applied under Section 3 to purchase the bank's shares from the retirees. The Board found that the stock purchase agreement between Florida National and the retirees gave Florida National control over the Bank in violation of Section 3 of the BHC Act. Based upon this violation, the Board denied Florida National's application to acquire the Bank.

It is thus apparent that the Board will not consider an illegal agreement to transfer shares of a bank, such as the agreement between Florida National and Retirees or the

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[42] 62 Fed. Res. Bull. 696 (Aug. 1976).

[43] 62 Fed. Res. Bull. at 696-97.

agreement between BCCI and Pharaon, to be a nullity.[44] Rather, such an agreement can and here does constitute evidence of a violation of the BHC Act.

3. Power to vote 25 percent of Independence Bank's voting shares constitutes control

A second method of possessing control is the direct or indirect power to vote 25 percent of the acquired bank's shares of any class of voting stock. Under the Board's prior rulings, financing arrangements extended to acquire a bank's shares on other than an arm's-length basis can be sufficient to pass control of the financed shares to the lender.

Again, the Board's decision in Florida National Banks[45] is instructive, the facts of which are outlined above.[46] Based upon Florida National's extension of credit to affiliated individuals to acquire shares of a bank, and a contemporaneous agreement indemnifying the individuals against any loss in connection with the acquired shares, the Board held that Florida National acquired control of the shares it financed without its approval and thereby violated Section 3 of the BHC Act.

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[44] See also 2 F.R.R.S. 5 397.2, in which Board staff rejected the argument that, because it would be illegal to exercise an option without Board approval, the option was not "immediately convertible."

[45] 62 Fed. Res. Bull. 696.

[46] See infra p. 98.

Similarly informative is the Board's ruling in The Fulton National Corporation.[47] Here, Fulton National applied to purchase several bank holding companies from individuals associated with its law firm. These individuals established the target holding companies and acquired the shares of their subsidiary banks with funds loaned by Fulton National at preferential rates and without risk. At the time the holding companies were established, State law prohibited Fulton National from acquiring the target banks. The arrangement was constructed to preserve Fulton National's opportunity to acquire the banks should the statute change.[48] The Board concluded that, through these arrangements, Fulton National acquired indirect ownership or control of more than 25 percent of the target banks' voting shares without the Board's prior approval, in violation of Section 3 of the BHC Act.[49]

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[47] 64 Fed. Res. Bull. 121 (Feb. 1978).

[48] 64 Fed. Res. Bull. at 122.

[49] Id. Note that, in this case, the Board distinguished a determination of control under Section 2(a)(2)(A) of the BHC Act from a determination under Section 2(a)(2)(C), which can only be made after an opportunity for a hearing on the record. Where a company indirectly acquires control over 25 percent or more of a bank's voting shares, it controls the bank under Section 2(a)(2)(A). There is no need to hold a formal hearing to resolve the issue. The Board ruled:

> Section 2(a)(2)(C) of the [BHC] Act provides that a company has control over a bank or company if the Board determines after notice and opportunity for a hearing that the company directly or indirectly exercises a "controlling influence" over the management or policies of the bank or company. For purposes of controlling

(continued...)

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[49](...continued)

influence proceedings pursuant to that section the Board has determined that company that owns directly or indirectly securities that are immediately convertible at the option of the holder or owner hereof into voting securities. 225-2(b)(5) of Regulation Y, 12 C.F.R. 225.2(b)(5).

The regulatory presumption applies in cases where a company may have control over a bank or company other than through the ownership of 25 per cent or more of any class of voting securities. In cases involving questions of control, the Board determines whether control exists pursuant to 2(a)(2)(A) through ownership of the requisite percentage of voting shares before inquiring as to the possible existence of controlling influence.

64 Fed. Res. Bull. at 122-23, n.3. See also F & M Operating Company, 59 Fed. Res. Bull. 117, 118 (Feb. 1973), that "[M]aking bank stock loans at lower than the prevailing interest rate may indicate that the lending bank is attempting to gain a measure of indirect control of the bank shares pledged as collateral for the loan without the approval of the Board as required by the [BHC] Act."); Walter E. Heller International Corporation, 64 Fed. Res. Bull. 329, 330, that providing individuals with below-market loans to acquire bank stock and taking the bank stock as collateral provides the lender with the capability to control the borrower and the bank); Locust Grove Bankshares Inc., 60 Fed. Res. Bull. 729, 731 dissenting statement of Governors Mitchell and Brimmer that making of a bank stock loan at an interest rate less than the prevailing rate may be a means whereby a lending bank, without obtaining Board approval, acquires indirect control of the borrowing bank's shares

(continued...)

These well-accepted principles of "control" under the BHC Act apply to the fact circumstances of this case. BCCI extended to Pharaon financing on unique terms to acquire the shares of Independence Bank, and Pharaon incurred no interest charges and had no obligation to repay the advances. Additionally, BCCI, rather than Pharaon, bore all the economic risk in the transaction, effectively indemnifying him against any loss, while retaining all future benefits to itself.[50] Finally, Naqvi, the only knowledgeable witness

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[49](...continued)
pledged as collateral); Suburban Bancors Inc., 69 Fed. Res. Bull. 635 (Aug. 1983), that indemnification agreements between a bank holding company and an individual purchasing bank stock offer the potential for shifting the economic risk of loss to the bank holding company and constitute control of the bank stock by the bank holding company within the meaning of section 2 of the Act; First United Bancorporation. Inc., 61 Fed. Res. Bull. 889 (Dec. 1975); First Nat'l Holding Cors., 63 Fed. Res. Bull. 929 (Oct. 1977), that where a subsidiary bank of a bank holding company finances the acquisition of a bank by its directors on preferential terms and without risk of loss to the borrowers, the bank holding company may control acquired shares in violation of the BHC Act; The Jacobus Company and Inland Financial Corporation, 60 Fed. Res. Bull. 130 (Feb. 1974), that agreement between a bank holding company and its president, who had acquired a bank individually, indemnifying the president against any loss should he sell the bank, was an indicia of control; Mid America Bancorporation, Inc., 60 Fed. Res. Bull. 131 (Dec. 1974).

[50] Prior to repayment of the Bank of Boston loan, BCCI was obligated for only $5 million of the $12.6 million advance.
(continued...)

testifying, declared that the intent of the arrangements was to preserve the shares of Independence Bank for later merger with BCCI, S.A. Based upon the Board orders cited above, BCCI controlled the shares of Independence Bank that it financed at terms more favorable than those otherwise available to Pharaon. Because it controlled more than 25 percent of Independence Bank's shares without Board approval, BCCI violated Section 3(a) of the BHC Act.

4. Power to appoint directors as control

A third means under the BHC Act of exercising control over a bank is domination over the affairs of the bank, and particularly the appointment of majority of directors.[51] A company need not have binding legal authority to appoint directors to control a second company under this provision[52], but control is established by an indirect domination over appointments to the second company's board.[53]

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[50](...continued)
Upon repayment, however, BCCI bore all of the economic risks in the transaction.

[51] Section 2(a)(2)(B) of the BHC Act, 12 U.S.C.A. § 1841(a)(2)(B).

[52] Section 2(a)(2)(B) of the BHC Act, 12 U.S.C.A. 1843(a)(2)(B), that a company controls another company if it "controls in any manner the election of a majority of the directors" of a company) (emphasis added).

[53] See, Financial General Bankshares, 63 Fed Res. Bull. at 1111.

BCCI controlled the appointments to the five member Board of Directors of Independence Bank. BCCI appointed Shoaib, one of its own employees, as chairman, asked Morton Michaels to remain with Independence Bank and sit on the board, recruited Lachlan Foster to sit on the board and consented to appointing Donald Mellert as a board member. Although Pharaon ostensibly controlled the remaining board seat, filled by the president of InterRedec, John Hall, BCCI prevented Pharaon from appointing Lodhi to Independence Bank's board when he succeeded Hall as president of InterRedec. Additionally, BCCI rejected several board candidates, including both Fane and Holsman. Based solely upon its ability to control appointments to Independence Bank's board, BCCI impermissible controlled Independence Bank under Section 3 of the BHC Act.

5. Summary of Control

In summary conclusion of the above, Pharaon violated Section 3(a) of the BHC Act on October 1, 1985, when he acquired registered title to the shares of Independence as nominee for BCCI, causing BCCI to become a bank holding company without Board approval. Additional acts of the same violation occurred through causing BCCI to obtain the power to vote 25 percent of those shares, and through causing BCCI to obtain the power to control the affairs of Independence by naming a majority of the Board of Directors. This violation continued through September 13, 1991, when Enforcement Counsel filed its notice of assessment of civil money penalties.

D. VIOLATIONS OF SECTION 5(C) OF THE BHC ACT

Section 5(c) of the BHC Act, 12 U.S.C. § 1844(c), provides in pertinent party that "[t]he Board from time to time may require reports under oath to keep it informed as

to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; ..." Under Section 225.5(b) of its Regulation Y, Part 225 of 12 Code of Federal Regulations, every bank holding company must annually file a report of its operations for the year. This requirement applies to foreign banks operating branches or agencies within the United States, as well as those companies that control banks within the United States. Section 225.2(c)(2) of Regulation Y, 12 C.F.R. § 225.2(c)(2).

BCCI Holdings, as an entity controlling a foreign bank operating agencies in the United States, filed the reports, known as FR Y-7 from the form designation, required under Regulation Y. In these reports, BCCI indicated that it had no ownership interests in banks in the United States. Because BCCI secretly controlled Independence Bank, this information was false. BCCI thus violated Section 5(c) of the BHC Act. Pharaon willfully aided in BCCI's violation by sending his own reports to the Federal Reserve, as well as by filing an application with the California State Banking Department and a notice with the FDIC, all falsely indicating that he was the sole owner of Independence Bank.

E. IMPOSITION OF PENALTIES

1. Statutory provisions

a. Civil money penalties.

Section 1847(b)(1) of the United States Code provides that:

> Any company which violates, and any individual who participates in a violation of, any provision of this chapter, or any regulation or order issued pursuant thereto, shall forfeit and pay a civil penalty of not more

than $25,000 for each day during which such violation continues.

Prior to the passage of Section 907(j)(2) of FIRREA, the daily forfeiture was no more than $1,000.

b. False report penalties.

Section 1847(d) of the United States Code, which was added by FIRREA, Section 911(e), contains a three-tier system of progressively higher penalties for progressively more egregious actives applicable to failure to file reports or information, or filing false or misleading reports or information. Note that the 1989 Amendments added a new section, 8(d) to the BHC Act, 12 U.S.C.A. § 1847(d), providing for tiered penalties for companies which either fail to make reports to the Federal Reserve or file false reports with the Federal Reserve. The Board has made clear, however, that individuals, as opposed to companies that violate reporting requirements continue to be subject to the lesser penalty provisions of Section 8(b) of the BHC Act even after the 1989 Amendments. See Vic Sather & Associates, Inc., 79 Fed. Res. Bull. 160, 162 (Feb. 1993):

> [I]ndividuals may be penalized under section 1847(b)(1) for their participation in reporting violations for which the companies are assessed under Section 1847(d). The plain meaning of the text of section 1847(b) authorizes penalties for any individual who "participates in" a statutory or regulatory violation, and nothing in the text of section 1847(d) conflicts with or restricts that general authority. While it is not apparent why Congress established a separate schedule of penalties applicable only to reporting violations by companies, it is clear that Congress did not expressly withdraw the Board's section 1847(b) authority to penalize individuals for violations, including reporting violations.

1. Calculating the maximum penalty.

In assessing a penalty, the Board is required to take into consideration several mitigating factors outlined in the FDA Act.[54] The Federal banking agencies have jointly issued a detailed explanation of these mitigating factors.[55] Congress has urged the agencies to consider these factors when determining the appropriate level of penalties.[56]

Pharaon violated two provisions of the BHC Act. First, he violated Section 3(a) by participating and assisting BCCI in acquiring control of Independence without approval from the Board. Second, he participated and assisted BCCI in filing five separate false reports with the Federal Reserve in violation of Section 5(c) of the BHC Act. Each of these six violations carries a maximum financial penalty of $1,000 per day for violations outstanding before the 1989 amendments to the BHC Act ("1989 Amendments"),[57] and $25,000 per day for violations outstanding after the 1989 Amendments.

With Pharaon's assistance, BCCI acquired control of Independence on October 1, 1985. This was 1,408 days

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[54] Section 8(b) of the BHC Act, 12 U.S.C.A. § 1847(b), referencing Section 8(i)(2)(G) of the FBI Act, 12 U.S.C.A. § 1818(i)(2)(G).

[55] Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, printed at 45 Fed. Reg. 59423, 59424 (Sept. 9, 1980) ("Interagency Policy Statement").

[56] House Report No. 101-54(I) at 469, reprinted at 1989 U.S.C.C.A.N. 86, 265.

[57] See FIRREA, cited supra n.738.

prior to the 1989 Amendments. At $1,000 per day, the maximum penalty for this period is $1,408,000. There were 765 days between the 1989 Amendments and the filing of the notice of assessment seeking civil money penalties against Pharaon. The maximum penalty for this period at $25,000 per day is $19,125,000. The total maximum penalty for violating Section 3(a) of the BHC Act is therefor $20,533,000.

BCCI filed a Y-7 for 1985 on May 20, 1986 falsely stating that it did not own Independence, in violation of Section 5(c) of the BHC Act. This violation was outstanding for 1,177 days prior to the 1989 Amendments. The maximum penalty for this period is $1,177,000. The violation was outstanding for an additional 765 days civil money penalty before the notice of assessment was filed. The maximum penalty for this period is $19,125,000. The total maximum penalty for BCCI's false 1985 Y-7 is $20,302,000.

BCCI filed a Y-7 for 1986 on April 27, 1987, again falsely stating that it did not own Independence. This violation was outstanding for 839 days prior to the 1989 Amendments, for a total penalty of $839,000 for this period. It was outstanding for an additional 765 days after the 1989 Amendments, for an additional penalty of $19,125,000. The maximum total penalty for this violation is $19,964,000.

BCCI filed a Y-7 for 1987 on May 1, 1988,[58] again falsely indicating that it did not own Independence. This

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[58] The Y-7 for 1988 is undated. Because Y-7's are due four months after the close of a foreign bank's fiscal year, Enforcement Counsel has assumed the Federal Reserve received this report on the last date it could have been timely filed.

violation was outstanding 465 days before the 1989 Amendments, for a maximum penalty of $465,000, and 765 after the 1989 Amendments, for a penalty of $19,125,000 and a total penalty for this violation of $19,590,000.

BCCI filed a Y-7 for 1988 on April 25, 1989 that similarly violated Section 5 of the BHC Act. This violation was outstanding for 106 days before the 1989 Amendments, for a penalty of $106,000 and 765 days after the 1989 Amendments, for a penalty of $19,125,000. The total penalty for this violation is $19,231,000.

BCCI filed a Y-7 for 1989 on May 22, 1990 with the same information. This violation was outstanding for 479 days, all of them after the 1989 Amendments, for a penalty of $11,975,000.

The total maximum penalty for all of Pharaon's participation in the violations of the BHC Act is $111,595,000, as set forth in the following chart.

(000's omitted from dollar figures)

	Acquisition of Independence Bank	1985 Y-7	1986 Y-7	1987 Y-7	1988 Y-7	1989 Y-7
Violation	1 Oct 1985	20 May 1986	23 Apr 1987	1 May 1988	25 Apr 1989	22 May 1990
Days before FIRREA	1408	1177	839	465	106	0
Penalty $1,000/day (max)	$1,408	$1,1777	$839	$465	$106	$0
Days after FIRREA	765	765	765	765	765	479

Penalty $25,000/ day (max)	$19,125	$19,125	$19,125	$19,125	$19,125	$11,975
Penalty	$20,533	$20,302	$19,964	$19,590	$19,231	$11,975

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TOTAL MAXI-MUM PENALTY	$111,595,000

2. Calculating the appropriate penalty

(a) Financial gain to Pharaon

The BHC Act provides the Board with wide discretion in computing the appropriate penalty to be levied against an individual within the parameters imposed by the statute.[59] The starting point for determining the proper level of civil money penalties is the gain to an individual or a company arising by reason of the violation.[60]

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[59] Although the Board has issued a civil money penalty "matrix" to aide with the determination of an appropriate level of civil money penalty in a given case, see GRP Ex. 171, this is simply a "tool" that in no way relieves the Board of its statutory obligation to exercise its "sound supervisory judgment" in assessing a penalty appropriate under the circumstances. See Rapp v. OTS, 52 F.3d 1510, 1521-22 (10th Cir. 1995). The matrix is not a rule or regulation that in any way binds the Board in assessing an appropriate penalty, nor can Respondent legitimately claim to have relied upon it in deciding to undertake his illegal actions. Id.

[60] Miller v. Federal Deposit Ins. Corp., 956 F.2d 58, 62-63 (4th Cir. 1992); K v. Federal Deposit Ins. Corp., 970 F.2d 71, 75 n.9 (5th Cir. 1992); Interagency Policy Statement 45 (continued...)

Enforcement Counsel originally sought a $37 million civil money penalty from Pharaon. This amount roughly corresponds to the damages BCCI suffered from its investment in Independence. Enforcement Counsel now seeks a penalty of $111,595,000. Enforcement Counsel state that when they filed their Notice of Charges in September of 1991, they were unaware that Pharaon's inducement for serving as BCCI's nominee included a holding out of possible future participation with BCCI in investments, and favorable loan relationships. Enforcement Counsel's opening statement, and post-hearing briefs, alleged that they first had the opportunity to conduct a substantive interview of Naqvi, the second party to the nominee designation, in February of 1995. They further assert that it was not until such time that they began to uncover the extensive relationship between BCCI and Pharaon and the extraordinary profit Pharaon realized from serving as BCCI's nominee. Naqvi's testimony elicited at the hearing was that Pharaon agreed to serve as BCCI's nominee in various stock transactions, including the NBG acquisition, the BCCI stock acquisition, and the Attock Oil and the Tradigrain acquisitions as well as the Independence acquisition. Naqvi's testimony in effect was that Pharaon participated in the Independent Bank transaction because of the investment opportunities and "other benefits" previously provided him and expected to be provided to him in the future by BCCI, and not merely the opportunity to acquire 15 percent of Independence Bank.[61] Based on this

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[60](...continued)
Fed. Reg. at 59424 that "[T]he agencies will consider, in addition to the other factors specified in the statute, the financial or economic benefit the respondent derived from the illegal activity."

[61] See, TR at 1,644-45 (Naqvi), on cross-examination, as (continued...)

revised information, Enforcement Counsel seeks additional civil money penalties from Pharaon to disgorge his "ill-gotten gains." The undersigned notes that Enforcement Counsel seek to amend the Notice herein to increase the civil money penalty threefold. Amendment must, by the Rules of Practice and Procedure applicable hereto, be "freely" granted by the Administrative Law Judge." 12 C.F.R. § 263.20.

Upon the contested motion of Enforcement Counsel, the hearing under the Notices originally issued were bifurcated for purposes of simplification and judicial economy, and this

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[61](...continued)
follows:

Sir, firstly, that I am telling the court what is the fact known to me. Secondly, if you are asking for my opinion, I have stated to the court that it was in the context of the overall relationship.

Sir, Dr. Pharaon himself told me that through BCCI and NBG transactions he had made considerable profit because of BCCI's situation and he was willing to go into similar joint ventures.

So the relationship was not the 15 percent of Independence Bank, sir, the relationship was the BCCI shares as nominee, the relationship was NBG shares as nominee. The enormous profit on those investments made and the facilities which were extended to Dr. Pharaon by BCCI at short notice, the "A" category facilities, (loans to Pharaon) no other bank would be willing to allow that kind of facilities unless there was a major overall relationship, sir.

Parenthetical explanatory material added from Respondent's posthearing reply brief, at 13.

proceeding was limited to the acquisition of Independence Bank. The acquisition of NBG was specifically ruled to be beyond the scope of this hearing other than for purposes of considering any profits to Pharaon as part of his financial situation. This hearing can not determine whether the NBG stock transaction, or the BCCI stock transaction, were in violation of the BHC Act, and of course the Attock Oil and Tradigrain stock transactions are not within the purview of our jurisdiction. Though the proposed amendment is supported by some documentary substantiation, and the oral testimony of one witness, and is not at this point contradicted by either document or testimony, to do otherwise would in the opinion of the undersigned be improper. Enforcement Counsel, and Petitioner, simply may not have it both ways -- to bifurcate and simplify the hearing by limiting it to a single area of transactions, and then to allege that other transactions were illegal, resulted in "ill gotten gains," and should be in considered in establishing the amount of civil money penalty.[62] The undersigned will therefor consider the assessment sought to be the $37 million as provided in the original notice, and not the $111 million claimed at hearing and in Enforcement Counsels' brief.

(b) Absence of mitigating factors

Section 8(b) of the BHC Act, 12 U.S.C. § 1818(i)(2)(G) requires the Board to take into consideration specified

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[62] Note that the undersigned has permitted evidence of some of these transactions to be admitted herein, but that he did so purely as background material, establishing a history of similar transactions not necessarily illegal, and utilized for the purpose of considering Pharaon's financial condition for purposes of mitigating an appropriate civil money penalty.

"Mitigating Factors" in assessing a civil money penalty.[63] Enforcement Counsel argue that these factors may be utilized only to increase any penalty to a level above the violator's financial gain, and not to lessen such penalty to below a level of the violator's financial gain. This cannot be correct, as the word "mitigate" is defined as meaning "to soften," "to become less harsh or hostile," "to make less severe or painful." The error apparently comes from Enforcement Counsel's reliance upon Miller, 956 F.2d, at 62-63, relating not to the statute, but to the Interagency Policy that "a significant consideration should be the financial or economic benefit the respondent obtained from the violation," and noting that while removal of economic benefit will usually be insufficient to promote compliance with statutory provisions, the penalty may in appropriate circumstances reflect an additional amount to provide a future deterrent. The penalty may, therefore, "in appropriate circumstances," reflect some additional amount beyond the economic benefit derived to provide a deterrent to future conduct, but on the other hand may be mitigated in consideration of the statutory factors cited. We shall first consider the mitigating circumstances, if any, and thereafter consider the "financial or economic benefit to Pharaon obtained from the violation."

a. Financial resources and good faith

As noted above, Pharaon is an extremely wealthy individual. In 1985, he declared his net worth to be almost half-a-billion dollars. Having established this as a point of consideration the Enforcement Counsel met their burden of

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[63] The factors in mitigation are "(i) the size of financial resources and good faith of the insured depository or other person charged; (ii) the gravity of the violation; (iii) the history of previous violations; and (iv) such other matters as justice may require."

proof, and during the hearing, Pharaon offered no evidence to indicate any substantive change in his financial or economic position since 1985. He exhibits the trappings of great wealth, including a large yacht, several airplanes, residences in Paris, London, and Saudi Arabia, as well as a plantation in Georgia.

There is no evidence of good faith. The individual who Pharaon argues was his attorney, Fields, cautioned him that, based only upon BCCI's purported role as investment advisor and Shoaib's assumption of the position as chairman of the board and chief executive officer, the regulators could view BCCI as controlling Independence Bank in violation of the BHC Act. Pharaon volunteered no information concerning the financing arrangements used to acquire Independence or the circumstances prompting him to sign the nominee designation. To do so would have undercut the intention of the agreement, which, according to Naqvi, both sides intended to keep secret. This "consciousness of guilt" is incompatible with any finding of good faith. As a principal investor in the holding company for NBG, Pharaon well understood the laws governing the ownership of banks in the United States.

Neither were the Y-7's and Y-6's filed with the Federal Reserve, which failed to indicate that BCCI controlled Independence, made in good faith. Senior officials of BCCI knew that their acquisition of Independence was in violation of United States law. To reveal their ownership interest through regulatory reporting would have defeated their intentions. Pharaon actively assisted BCCI in filing these false reports first by acquiring the shares of Independence in his own name, making it possible for BCCI to deny ownership over the shares, and second by filing his own false reports with the Federal Reserve indicating that he, and not BCCI, owned Independence. Respondent had no good faith basis for making these statements.

b. Gravity of the violation

Pharaon violated both Sections 3 and 5 of the BHC Act. These violations are especially grave in that they threaten the manner in which the Federal Reserve and other Federal banking regulators supervise banks in the United States. The Federal bank regulators expect that regulatory filings will be truthful. Consequently, absent an exceptional circumstance, they dispense with fact-finding hearings on bank holding company applications and other filings. They base their decisions on the facts which applicants represent to be true. For these reasons, where it becomes apparent that an individual has intentionally falsified regulatory filings, it is particularly important to take aggressive enforcement action against the responsible party. Otherwise, the perception may develop that there are no consequences to submitting false regulatory filings and little benefit to telling the truth.

In the instant situation, the FDIC and the California Banking Superintendent were reassured by Pharaon's extraordinary personal wealth and by his direct and personal responsibility. These supervisors believed Pharaon could and would serve as a source of strength for Independence should it require capital infusions. These regulators did not know that Pharaon's participation was bogus, and that he had little personal financial stake in Independence Bank and its continuing operation.

(1) Section 3(a)

Congress granted the Federal Reserve the critical authority to approve the formation of bank holding companies,[64] and to regulate their non-banking activities.[65]

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[64] Section 3 of the BHC Act, 12 U.S.C.A. § 1842.

In allowing a company to acquire a bank, the Federal Reserve must consider, among other factors, the financial and managerial resources of the company seeking to acquire a bank.[66]

Bank holding companies must serve as a source of financial strength for their subsidiary banks,[67] and those that cannot do so are not permitted to become bank holding companies.[68] When BCCI secretly acquired control of Independence Bank, it deprived the Federal Reserve of the opportunity to evaluate BCCI's ability to serve as a source of strength for Independence, the loss of which had been carefully hidden by BCCI. BCCI had intentionally avoided subjecting itself to this analysis to avoid revelation of its financial condition. When Independence Bank required that strength, it found Pharaon unwilling to contribute capital and BCCI financially crippled.

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[65](...continued)

[65] Section 4 of the BHC Act, 12 U.S.C.A. § 1843.

[66] Section 3(c) of the BHC Act, 12 U.S.C.A. § 1842(c).

[67] Section § 225.4(a) of Regulation Y, 12 C.F.R. § 225.4(a) (1995); 2 F.R.R.S. ¶ 4-878 (Board's policy statement on its source-of-strength doctrine); Board of Governors of Federal Reserve System v. First Corp., 439 U.S. 234, 252-54, 99 S.Ct. 505, 513-15 (1978).

[68] See, Gore-Substantiation Bancorp, 78 Fed. Res. Bull. 784 (Oct. 1992); Center Financial Corp., 76 Fed. Res. Bull. 23 (Jan. 1990); Croesus Partners I, 72 Fed. Res. Bull. 45 (Jan. 1986); F.B.N.A. Holdings Co., 75 Fed. Res. Bull. 711 (Oct. 1989); St. Croix Valley Bancshares, 75 Fed. Res. Bull. 575 (Aug. 1989).

Bank holding companies must also serve as a source of managerial strength for their subsidiary-banks.[69] Again, the Board will not allow companies who fail to demonstrate the competence of their management to acquire subsidiary banks, especially where management practices amount to violations of law.[70] At the time when it secretly acquired Independence, BCCI was engaged in highly questionable management practices. In addition, the questionable practices include the failure to disclose extraordinary losses, the purchase of its own shares through nominees. In addition, the questionable management practices also included the purchase of other corporations through nominees, the purchase of NBG, a bank in the United States, without applying to become a bank holding company, the use of "triangular placements" as a means of kiting loans, and embezzling huge amounts of customers' investment funds for its own purposes.

BCCI's selection of Kemal Shoaib as head of Independence Bank involved Independence in numerous real estate joint ventures without sufficient capital, which could not have occurred had BCCI, a bank holding company, complied with Federal Reserve supervisory policies. These joint ventures resulted in Independence Bank's insolvency. Because Pharaon acquired Independence's shares in his name on behalf of BCCI, the Federal Reserve did not have the opportunity to evaluate BCCI's management capabilities prior to it becoming a bank holding company.

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[69] Section 3(c) of the BHC Act, 12 U.S.C.A. § 1842(c).

[70] Seilon, Inc., 63 Fed. Res. Bull. 156 (Feb. 1977) in which a bank where the applicant had violated Section 3 of the BHC Act was denied authority to acquire another bank; First State Holding Co., 67 Fed. Res. Bull. 802 (Oct. 1981).

(2) Y-7 and Y-6 Reports

In upholding a civil money penalty imposed upon an individual who, in good faith, inadvertently filed misleading reports with the Federal Reserve, the Board described the importance of complying with its reporting requirements, as follows:

> Reporting requirements are a fundamental component of the Board's responsibility for supervising bank holding companies. The filing of a late or inaccurate regulatory report impairs and delays the Federal Reserve's ability to assess accurately the condition of the bank holding company involved, and may affect the Board's ability to monitor the banking system generally.[71]

The Board concluded that the gravity of any violations of its reporting requirements weighed in favor of "significant" penalties.[72]

Unlike the Respondent in Vic Sather, Pharaon's violations of Section 5 of the BHC Act were not inadvertent or careless. Pharaon assisted BCCI in deceiving the Federal Reserve as to the actual ownership of Independence and the condition of the undisclosed holding company, making his violations considerably more serious than those of the Vic Sather respondent. While not necessarily requiring assessment of maximum penalties, the gravity of Pharaon's violation will not permit any mitigation of penalty in this regard.

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[71] Vic Sather & Associates, Inc., 79 Fed. Res. Bull. 160, 164 (Feb. 1993).

[72] Id.

c. History of previous violations

The Board may also consider an individual's other violations of banking laws in assessing a civil money penalty. Pharaon violated a series of laws in addition to Section 3 and 5 of the BHC Act in connection with the acquisition of Independence.[73] His Change in Bank Control Act notice to the FDIC contained multiple false statements, including those referring to his indebtedness to BCCI, his ownership of BCCI stock, the limitations of his beneficial ownership of NBG stock, the financing for the Independence acquisition, and his intended ownership interest in Independence. Each of these statements constituted a criminal offense.[74]

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[73] The Board may consider both violations that have been previously proven against a respondent as well as violations of banking law that come to light in the course of a hearing in determining the proper level of civil money penalty. In the Interagency Policy Statement, the Federal banking agencies declare that, in determining civil money penalties they will consider both a respondent's history of prior violations, particularly where similarities exist between those and the violation under consideration, 45 Fed. Reg. at 59425 (Factor 9) and any previous criticism for similar violations. Id. (Factor 10). Any violations proven against a respondent in the past would be covered as "previous criticisms" under Factor 10. Since Factor 9 must signify something distinct from Factor 10, the history of previous violations it references must include previous violations that came to light during the administrative hearing.

[74] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,

(continued...)

Pharaon also made false statements to the Bank of Boston in connection with his application to obtain the initial financing for the acquisition. He certified that no one, other than himself, had a beneficial interest in the shares of Independence, that no other party had provided financing for the Independence acquisition and that no other party had a security interest in Independence's shares. Each of these false representations may also constitute separate acts of bank fraud,[75] which while not charged in this proceeding has a possible serious consequence in assessing an appropriate penalty.

Pharaon shared confidential examination material concerning Independence with individuals outside of the bank. While in Amsterdam, he shared Independence's most recent examination report with Dobrich, not yet an Independence employee. The report itself indicated that this disclosure was a violation of Federal law.[76]

Enforcement counsel charge that in addition to violating Sections 3 and 5 of the BHC Act by assisting BCCI in acquiring Independence, Pharaon committed additional independent violations of this statute by serving as a nominee

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[74](...continued)
fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1001.

[75] 18 U.S.C.A. § 1344.

[76] See 12 C.F.R. §§ 309.6 and 350.9, concerning the disclosure of FDIC examination reports by a depository institution.

in acquiring shares of BCCI Holdings and NBG. As noted, however, the bifurcation of this proceeding limiting the charges to Independence Bank would require a further hearing into the alleged violations in those other allegations in order to consider them here.

d. Other factors as justice may require

Pharaon helped BCCI acquire Independence in egregious and flagrant violation of United States banking law. He was well aware that his actions violated the law. The record in this matter includes no factors that would tend to mitigate civil money penalties against Pharaon.

3. Civil Money Penalty - The Bottom Line

Civil money penalties are intended to serve two deterrent functions.[77] They are supposed to deter the offender from committing further offenses.[78] To do this effectively, the penalty must disgorge any profit the offender has received and impose some further penalty for his conduct.[79] A civil money penalty should also deter other individuals from engaging in similar actions.[80] Pharaon's violations of law were intolerable. The Board is required to expend extensive time, effort and expense to enforce the CBC Act, and the penalty for violations should reflect this factor and make clear that the Board shall not accept this behavior.

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[77] Vic Sather, 79 Fed. Res. Bull. at 164.

[78] Id.

[79] Interagency Policy Statement, 45 Fed. Req. at 59424.

[80] Vic Sather, 79 Fed. Res. Bull. at 164.

Quantification, the "bottom line" on civil money penalties, is always difficult. Prior to the enactment of FIRREA, the Federal Financial Institutions Examination Council ("FFIEC") developed a list of thirteen factors to consider in determining a civil money penalty assessment, emphasizing that "a significant consideration should be the financial or economic benefit to respondent obtained from the violation." Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,4523 (1980). The policy also stated in pertinent part that:

> "[t]he removal of economic benefit will, however, usually be insufficient by itself to provide compliance with the statutory provisions. The penalty may, therefore, in appropriate circumstances reflect some additional amount beyond the economic benefit derived to provide a deterrent to future conduct."

In this regard, in 1989 the House Banking Committee recognized thirteen factors, and urged the agencies to take them into account, as follows:

> The Committee expects the banking agencies to take into account mitigating, as well as any aggravating factors, in determining [civil money penalty] amounts. In that regard, the committee strongly encourages the regulators to adopt and utilize the interagency policy concerning the assessment of civil money penalties, issued by the Federal Financial Institution's Examination Council in 1980. The 13 guidelines contained in that policy statement should be considered whenever a regulatory agency is assessing the [civil money penalty]. The FFIEC guidelines specifically do not preclude any regulatory agency from considering

other matters relevant to the consideration of a [civil money penalty] assessment.[81]

In In the Matter of Rapp, ERC Order No. 90-7, issued December 4, 1992, the Office of Thrift Supervision ("OTS") refined the matrix in view of the three-tier penalty assessment provided in FIRREA. Though the guideline, and the Rapp application formula, are as noted above not required to be rigidly imposed, it is equally adaptable to pre-FIRREA violations as well, and shall be quoted here at length before application is attempted, as follows:

> This approach requires careful attention to selection of the appropriate starting amount. ... the second step is to assign a daily dollar amount to the starting point for calculating the penalty. Selection of the starting dollar amount should reflect the gravity of the wrongdoing ... In 1980, FFIEC emphasized that the respondent's economic benefit was a significant factor in assessing a civil money penalty. Loss to the institution is today another cornerstone of a penalty assessment. ... Indeed, it is one of OTS's principal functions to deter conduct that will cause losses at a savings association or to the insurance fund.
>
> In order to punish or deter wrongdoing that poses a risk to an insured institution or to the insurance fund, the appropriate starting dollar amount in the penalty determination process would generally be the amount the loss or risk of loss to the institution, or personal gain to the respondent, if either is present.

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[81] H.R. Report No. 54(i). 101st Congress, 1st Sess. 469 (1989).

... The Director's judgment is that (in the lower two tiers, half the amount of the statutory maximum is the appropriate starting dollar amount, and that where million dollar per day penalties are the maximum) the starting dollar amount should be $100,000[82] ... These amounts are both well below the maximum -- so that where aggravating factors are present the penalty may be increased ...

With the starting dollar amount selected, it is necessary to decide whether the penalty should be assessed on a continuing basis. The legal test for a continuing violation is whether (a) the detrimental effect of the violation continued and (b) the effect could have been undone or cured by the respondent taking or refraining from a particular action. Merely because a violation satisfies this legal test does not mean that the penalty must be assessed on a continuing basis. In deciding whether to assess on a continuing basis, the Director will consider whether the respondent continued the violation either intentionally or in spite of warnings from regulators or others. If the penalty is assessed over a number of days, the starting dollar amount should be multiplied by this number. ...

1. Willfulness. FFIEC directs that the agency consider whether there is "[e]vidence that the violation or pattern of violations was intentional or committed with a disregard of the law or the consequences to the institution." This factor addresses the culpability of a respondent. In order to provide an adequate deterrent to culpable conduct, the Director believes that evidence of

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[82] As noted above, the tier system is not applicable in this proceeding for either pre- or post FIRREA charges.

this factor warrants an increase in the penalty from the starting amount of up to 25%.

2. Frequency or recurrence. FFIEC instructs that an agency take into account "[t]he frequency or recurrence of violations and the length of time the violation has been outstanding." This factor may relate directly to culpability or to risk to an institution, and, even when it does not, it is important that violations not be repeated and be terminated at as early a time as possible. In order not to prevent long-term or repetitious violations, the director believes that evidence of any of the factors supports an increase from the starting point of up to 10%.

3. Continuation of violation. "Continuation of violation after the respondent becomes aware of it, or its immediate cessation and correction" is another factor that an agency should consider. Like the "frequency or recurrence" factor discussed above, this factor is intended to deter continuing violations. Its focus, however, is on the respondent's conduct once the respondent becomes aware of the violation. Continuing after becoming aware of the fact of violation is a serious indicium of culpability and warrants an increase of up to 15% from the starting amount. On the other hand, immediate correction of a violation indicates good faith and would merit a reduction of up to 15%.

4. Failure to cooperate. FFEIC also directs that an agency consider "[e]vidence of concealment of the violation, or its voluntary disclosure." Supervision of the safety and soundness of an institution depends critically on open and candid communications between OTS and the institution. Concealment -- active efforts to impede such communications -- are an especially serious matter and are on a par with willfulness. An increase of up to 25% from the starting amount may be warranted. It is

also important that free communications be encouraged. If a respondent voluntarily discloses the violation before its discovery by the agency, then a reduction of up to 25% may be taken.

5. Concealment. FFIEC also directs that an agency consider "[e]vidence of concealment of the violation, or its voluntary disclosure." Supervision of the safety and soundness of an institution depends critically on open and candid communication between OTS and the institution. Concealment -- active efforts to impede such communications -- are an especially serious matter and are on a par with willfulness. An increase of up to 25% from the starting amount may be warranted. It is also important that free communications be encouraged. If a respondent voluntarily discloses the violation before its discovery by the agency, then a reduction of up to 25% may be taken.

6. Harm to the institution or public confidence. "Any threat of or actual loss or other harm to the institution, including harm to public confidence in the institution, and the degree of any such harm" must be taken into account. As discussed above, the harm to the institution is important in setting the starting amount for a civil money penalty. If, in addition to a quantifiable loss, the wrongdoing poses other risks to the institution, then an increase is appropriate. For example, a loss that also presents the possibility of a liquidity crisis would merit an increase in the penalty. Such especially serious conduct would warrant an increase in the penalty of up to 25%. If no harm or risk of harm to the institution occurred, then a reduction of up to 75% may be taken.

7. Gain or benefit. An agency should consider "[e]vidence that participants or their associates received financial or other gain or benefit or preferential treatment

as a result of or from the violation." An identifiable gain may be used in setting the starting amount for a penalty. Other benefits, not quantifiable, may also be derived from misconduct. If such benefits to a respondent did result, than an increase in the starting amount should be made. The increase should not exceed 10%.

8. Restitution. Assessment of a civil money penalty should reflect "[e]vidence of any restitution by the participants in the violation." Because prevention of loss to an institution or to the insurance fund is so central to OTS's regulatory activities, efforts by wrongdoers to make restitution should be encouraged. The starting amount should be reduced by at least the amount of the restitution. In addition, if the restitution is voluntary, then the penalty amount may be reduced up to an additional 25%.

9. Prior violations. FFIEC also direct that "[history] of prior violations, particularly where similarities exist between those and the violations under consideration" be considered in the penalty assessment. In order to deter repeated wrongdoing, an increased penalty may be called for where the respondent has a history of violations before the current one. Alternatively, a first time offender may merit a slightly reduced penalty. This factor is, however, less important than those that concern loss to the institution or culpability. Accordingly, any adjustment based on this factor should not exceed 10%.

10. Previous criticism. The agency also should take into account any "[p]revious criticism of the institution for similar violations." Failure to respond to previous criticism is evidence that an institution is not being run with the diligence that is appropriate. In order to deter such laxity, the Director believes that an increase of up to 10% may be appropriate.

11. Compliance program. The agency should consider the "[p]resence or absence of a compliance program and its effectiveness" in determining a civil money penalty amount. The safety and soundness of an institution will be better maintained and the risk of repeated violations will be diminished, if there are compliance programs in place and if they are effective. Accordingly, if the respondent has voluntarily established an effective compliance program, the starting amount may be reduced by up to 25%.

12. Unsafe or unsound practices, or breaches of fiduciary duty. An agency should take into account whether there is a "[t]endency to create unsafe or unsound banking practices or breach of fiduciary duty." A breach of fiduciary duty is generally an unsound practice, and it is apparent that any wrongdoing that threatens the safety and soundness of an institution must be deterred. An increase of up to 25% may be appropriate.

13. Preventive measures. An agency also is expected to consider "[t]he existence of agreements, commitments or orders intended to prevent the subject violation." This factor involves the prevention of wrongdoing and the risks it may pose to an institution. If the violation involves the breach of an existing agreement, commitment, or order, then there likely is an element of willfulness that must be deterred by an increased penalty. Alternatively, a penalty should be reduced if, following identification of the violation, the respondent has initiated efforts to create an appropriate agreement, commitment or order. The degree to which the starting penalty may be increased or reduced is 10%.

> In addition to these factors, the agency must be sure to take into account the factors set forth in Section 8(i)(2)(g) of the FDIA ...

The undersigned undertook an application of both starting amounts and percentage adjustments, the details of which are not repeated since they resulted in computation of a civil money penalty of slightly over $300 million, while the cap on such computation remains at the maximum penalty, here at most just over $111 million.

The mitigation proviso of the statute permits the application of some judgmental rationality. The undersigned recommends that the civil money penalty assessed against Pharaon be limited to less than the maximum of $111 million, but should be not less than the one-third thereof, to wit, $37 million, the amount sought in the original Notice. The undersigned recommends this amount in spite of the egregiousness of Pharaon's wilful, knowing, continuing violations engaged in with absolute disregard for accuracy of reports or for any consideration of the requirements of law. This recommended assessment of $37 million includes only consideration of the misconduct involving the bifurcated issue presented at this hearing. This is a very meaningful figure, in line with the gravity of the offenses, the intentional nature of the actions, the attempts to conceal the nature of the transactions, the expected levels of profit and the realities of loss. The amount, however, takes into account that insofar as the transactions with Independence are concerned, Pharaon did not enjoy any material financial or other benefit. Further, the collection of this sum is clearly within Pharaon's means and its collection in toto or in greater part is presumably secured by the predecisional attachment. That the Respondent has deep pockets and might well be able to afford a greater amount is not of itself grounds for increase.

F. ISSUANCE OF AN ORDER OF PROHIBITION

Section 8(e)(1) of the FBI Act, 12 U.S.C. § 1818(e)(1), provides in pertinent part that the Board, as the appropriate Federal banking agency, may issue an order prohibiting a party affiliated with a depository institution (institution-affiliated party, or "IAP" as defined by 12 U.S.C. § 1813(u)), from participating in the affairs of a federally insured depository institution in the United States if it determines that all of the statutory requirements have been satisfied. Statutory requirements include (A) the misconduct, (B) the effect of the misconduct, and (C) the culpability of the Respondent, as follows:

> **(A)** any institution-affiliated party has, directly or indirectly-
>
> (i) violated-
> (I) any law or regulation;...
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution...; or
>
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
>
> **(B)** by reason of the violation, practice, or breach described in any clause of subparagraph (A) -
>
> (i) such insured depository institution ... has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach -

(i) involves personal dishonesty on the party of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or other business institution, ...

BCCI Holdings' control over Independence Bank made it an illegal bank holding company. Under Section 3(q)(2)(F), of the FBI Act, 12 U.S.C. § 1813(q)(2)(F), the Board is the appropriate Federal banking agency for matters involving bank holding companies and their institution-affiliated parties (IAPs). Additionally, BCCI, S.A. was a foreign bank operating agencies in the United States. Under Section 3(q)(2)(C) of the FBI Act,12 U.S.C. § 1813(q)(2)(C), the Board is the appropriate Federal banking agency for such entities and their IAPs.

An IAP includes an individual who acts as an agent of an insured depository institution.[83] Pharaon was an IAP of BCCI. Acting as BCCI's agent, Pharaon purchased shares of Independence. An IAP also includes a shareholder who participates in the conduct of the affairs of an insured

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[83] 12 U.S.C.A. § 1813(u)(1).

depository institution.[84] Pharaon was the beneficial owner of a large block of BCCI shares, and BCCI was a beneficial owner of Independence Bank. By serving as nominee owner for many of BCCI's investments, he also participated in the conduct of BCCI's affairs. For all of these reasons, Pharaon is an IAP of BCCI.

Pharaon and BCCI acted together to violate Sections 3 and 5 of the BHC Act, as has been discussed extensively above. Because BCCI extended $23 million in non-recourse loans to acquire Independence Bank, and made capital contributions totalling $17.5 million, all in non-recourse loans to and with the participation of Pharaon, BCCI suffered more than $40 million in losses. Independence Bank eventually failed because of the attempts by BCCI, with the participation of Pharaon, to garner quick and large profits to cover its previous losses. Finally, Pharaon's violations required multiple acts of personal dishonesty, including a pattern of knowing misstatements to the FDIC in the CBC Act notice, to his attorney in completing the notice, to the banking supervisory authorities of California, to the Bank of Boston to obtain funding for the acquisition and to the banking supervisory agencies, in both BCCI's Y-7's and NBG's Y-6's, concerning the ownership of Independence.

Pharaon, an IAP of BCCI, violated the BHC Act and other laws and regulations. He further participated in unsafe and unsound banking practices, resulting in a substantial loss to BCCI and to Independence Bank, a Federally insured depository institution. This resulted in a situation where the interests of the insured depository's depositors could be prejudiced. The violations and practices involved personal dishonesty on Pharaon's part and demonstrates willful and continuing disregard for the safety and soundness of the

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[84] 12 U.S.C.A. § 1813(u)(3).

depository institution. The statutory requirements having been satisfied, the Petitioner is entitled to issue an Order prohibiting Pharaon's participation, in any manner, in the conduct of the affairs of any Federally insured depository institution.

V. CONCLUSIONS OF LAW

In consideration of the numerous finding of fact, applied in discussion, all as above, the undersigned makes the following conclusions of law as to both the prohibition and the assessment:

1. The Board of Governors of the Federal Reserve System is the authorized banking supervisory agency having jurisdiction over the matters set forth herein.

2. Pharaon was at all pertinent times mentioned herein an institution-affiliated party.

3. Pharaon was at all pertinent times mentioned herein a nominee of BCCI and ICIC Overseas in the purchase of the stock of Independence Bank.

4. BCCI and ICIC Overseas acquired ownership and control of at least 85 per cent of the stock of Independence Bank without prior approval of the Board.

5. Pharaon caused, brought about, participated in, and aided and abetted the unapproved acquisition of control of Independence Bank stock by BCCI and ICIC Overseas.

6. As nominee for BCCI and ICIC Overseas, Pharaon knowingly and with reckless disregard for accuracy, caused, brought about, participated in, and aided and abetted BCCI and ICIC Overseas in submitting required annual reports, Forms Y-7, for the years 1986 through 1989 inclusive.

7. As nominee for BCCI and ICIC Overseas, Pharaon knowingly filed a false notice with the Federal Deposit Insurance Corporation pursuant to the Change in Bank Control Act and concealed the acquisition of ownership of control of Independence Bank's shares and the formation of a bank holding company without approval.

8. The above violations of law and regulation involve personal dishonesty and a wilful and a continued disregard for the safety and soundness of the depository institution on the part of Pharaon and resulted in substantial financial loss and other damage to BCCI and to the Independence Bank.

9. That by reason of the above, a final order prohibiting Pharaon from participating in further operations of any Federally insured depository institution should be issued.

10. That by reason of the above, a final order assessing civil money penalties against Pharaon in the amount of $37,000,000 should be issued.

VI. PROPOSED FORM OF ORDER

In view of the findings of fact set forth herein, and the discussion of the statutes and issues involved, it is hereby recommended that a Final Order of Prohibition and Assessment of Civil Money Penalty be issued substantially in the form of the proposed Order attached.

Walter J. Alprin
Administrative Law Judge
Office of Financial Institution
Adjudication

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of	)	
	)	
GHAITH R. PHARAON,	)	Docket Nos.
	)	91-037-E-I1
An Institution-Affiliated Party	)	91-037-CMP-I1
of BCCI Holdings (Luxembourg),	)	
S.A., Luxembourg, and the Bank	)	
of Credit and Commerce	)	
International, S.A. (Luxembourg)	)	

FINAL ORDER OF PROHIBITION AND ASSESSMENT OF CIVIL MONEY PENALTY

(Issued April 12, 1996)

WHEREAS, this matter came before the Board upon the issuance on September 13, 1991 of a Notice of Assessment of Civil Money Penalty pursuant to Section 8(b) of the Bank Holding Company Act of 1956 ("BHC Act"), as amended, and Amended Notice of Intent to Prohibit pursuant to Section 8(e) of the Federal Deposit Insurance Act ("FDIC Act"), as amended ("the Notices"), 12 U.S.C. § 1818(e), against Respondent **GHAITH R. PHARAON,** seeking a civil money penalty assessment in the amount of $37,000,000, upon charges of violating the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq., and Regulation Y of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 225, by having caused, participated in and aided and abetted in the acquisition by BCCI Holdings (Luxembourg), S.A. of

the control of the Independence Bank, of Encino, California, and thereby becoming a bank holding company without prior approval, in violation of Section 3(a) of the Bank Holding Company Act, 12 U.S.C. § 1842(a); and caused, participated in and aided and abetted BCCI in filing false annual filings of Y-7s with the Board; and seeking the issuance of an Order prohibiting the said **GHAITH R. PHARAON** from further participation in the affairs of Federally insured depository institutions; and

WHEREAS, after a hearing on the record pursuant tot he Administrative Procedure Act, Chapter 5 of Title 5 of the United State Code, and briefing of the issues, the Administrative Law Judge issued a Recommended Decision on April 12, 1996, recommending imposition of the civil money penalty assessed and recommending the issuance of an order of prohibition; and

WHEREAS, it is the Final Determination of the Board of Governors of the Federal Reserve System that the Recommended Decision of the Administrative Law Judge shall be accepted [as modified by the Final Decision issued concurrently herewith]; and for other good cause shown, it is hereby

ORDERED, that a civil money penalty in the sum of $37,000,000 be, and it is hereby assessed against **GHAITH R. PHARAON,** remittance of which must be made forthwith, in immediately available funds payable to the order of the Secretary of the Board of Governors, who shall make remittance of the same to the Treasury of the United States; and it is further

ORDERED, that in the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section

8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), **GHAITH R. PHARAON** is hereby prohibited:

(1) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));

(2) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));

(3) from violating any voting agreement previously approved by the appropriate Federal banking agency; or

(4) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the Act, (12 U.S.C. § 1813(u)), such as an officer, director or employee; and it is further

ORDERED, that this Order shall become effective upon the expiration of sixty days after service hereof is made, and that each provision hereof shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

By Order of the Board of Governors, this _____ day of _____, 1996.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

_____

William W. Wiles
Secretary to the Board

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of	)	Docket Nos.
	)	91-037-E-I1
GHAITH R. PHARAON,	)	91-037-CMP-I1
	)	
An Institution-Affiliated Party of BCCI Holdings (Luxembourg), S.A., Luxembourg, and the Bank of Credit and Commerce International, S.A. (Luxembourg)	)	

CORRECTIONS TO RECOMMENDED DECISION

(April 15, 1996)

Transmitted herewith find nine corrected pages, with the changes noted below. The changes do not affect the Recommendation, and the corrected pages should be inserted.

(1) Table of Contents, second page, it IV, D, strike out "AND 8(A) OF THE INDEPENDENCE BANK."

(2) Page 1, at "II," change "REDOMMENATION" to "RECOMMENDATION."

(3) Page 82, line 13, change "sentance" to "sentence."

(4) Page 86, line 24, change "nank" to "bank."

(5) Page 87, line 4, change "dirctors" to "directors"; line 7, change "compny" to "company."

(6) Page 94, line 21, change "Naqly" to "Naqvi."

(7) Page 104, line 7, change "maya to "may."

(8) Page 111, line 6, change "previiously" to "previously."

(9) Page 127, first line, change "$300 million" to "$151 million"; ninth line, change "amouny" to "amount"; and, tenth line, change "egregiousnss" to "egregiousness."

Walter J. Alprin
Administrative Law Judge
Office of Financial Institution Adjudication

H. BCCI'S AND PHARAON'S REPRESENTATIONS TO THE FEDERAL RESERVE

I. PHARAON'S FINANCIAL CONDITION

IV. DISCUSSION AND CONCLUSIONS

A. OVERVIEW

B. CREDIBILITY ISSUES

C. VIOLATION OF SECTION 3(a) OF THE BHC ACT

1. Statutory provisions
2. BCCI controlled Independence through ICIC Overseas

a. BCCI controlled the ICIC Staff Benefit Trust

b. The ICIC Staff Benefit Trust controlled ICIC Holdings

c. ICIC Holdings controlled ICIC Overseas and Independence Bank

d. The agreement designating the nominee

e. The nominee designation was modified but never rescinded

f. The nominee designation represented the agreement of the parties and not a nullity

3. Power to vote 25 percent of Independence Bank's voting shares constituted control

4. Power to appoint directors constituted control

5. Summary of Control

D. VIOLATIONS OF SECTION 5(c) OF THE BHC ACT

E. IMPOSITION OF CIVIL MONEY PENALTIES

1. Calculating the maximum penalty

2. Calculating the appropriate penalty

a. Financial gain to Pharaon
b. Absence of mitigating factors

3. Civil Money Penalty - The Bottom Line

F. ISSUANCE OF AN ORDER OF PROHIBITION

V. CONCLUSIONS OF LAW

VI. PROPOSED FORM OF ORDER

CERTIFICATE OF SERVICE

8. PRELIMINARY STATEMENT

This proceeding is a portion of what has been referred to as the "global" set of Notices encompassing a greater number of individuals and of institutions, and of other matters, global both in the description of magnitude as well as in the geographic sense. At the request of Enforcement Counsel, and over the objections of Respondent's counsel, this proceeding is limited to the allegations regarding the change in bank control over Independence Bank, of Encino, California. Ownership by Respondent in the National Bank of Georgia, and other matters, have been admitted into evidence as background and as a showing of Respondent's financial condition, and not to prove or disprove the occurrence of violations involving stock ownership or transfer of control.

9. STATEMENT OF THE CASE AND SUMMARY OF RECOMMENDATION

On September 13, 1991, Petitioner Board of Governors of the Federal Reserve System ("Board") filed its Notice of Assessment of a Civil Money Penalty issued pursuant to Section 8(b) of the Bank Holding Company Act of 1956 ("BHC Act"), as amended, and Amended Notice of Intent to Prohibit (the "Notices"), issued pursuant to Section 8(e) of the Federal Deposit Insurance Act ("FDIC Act"), as amended, 12 USC § 1818(e). The Notices allege that the Bank of Credit and Commerce International ("BCCI")[1]

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[1] FOOTNOTE OMITTED

B. CREDIBILITY ISSUES

1. Naqvi and Imam

Respondent argues that the testimony of Naqvi and of Imam should be afforded little if any weight, in that both have been convicted and incarcerated as a result of the matters involved, and that Naqvi seeks a reduction of time in prison for cooperation with Enforcement Counsel, and Imam also seeks favorable treatment of some type.

Guilty pleas by both witnesses have indeed been entered, against Naqvi in the United States and against Imam in the United Kingdom, for crimes involved in the matters discussed herein. Both were incarcerated at the time of their testimony. Full details of terms of sentence, and conditions for reductions in sentences through cooperation are not contained in the record. Enforcement Counsel state in their Reply Brief after hearing that Imam's sentence will have been completed prior to the completion of this recommendation, and that Naqvi's term, reduction of which is said not to be dependant upon his favorable testimony in this proceeding, will be concluded shortly thereafter.

None of the above arguments and counterarguments are considered by the undersigned to be of any great importance. The undersigned does not concur with the outmoded legal concept that falso in unis, falso in omnibus, that one falsehood portends falsehoods in all statements. While Naqvi clings to the belief that his misconduct was of greater necessity, he fully understands the criminality of his former behavior and has accepted his punishment. The same acceptance has been made by Imam. This hearing required both oral testimony and documentary evidence in

C. VIOLATION OF SECTION 3(a) OF THE BHC ACT

1. Statutory provisions

Section 8(b)(5) of the BHC Act, 12 U.S.C.A. § 1847(b)(5) (West 1989). Section 8(b)(5) reads:

> For the purposes of this section [on civil money penalties], the term "violate" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation."

Section 8(b)(5), which superseded 12 USC § 1847(b)(1) (1982), simply re-codified language previously appearing in the BHC Act.

Section 3(a) of the BHC Act, 12 U.S.C. § 1842(a), provides in pertinent part that:

> [i]t shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company, ... [or] (3) for any bank holding company to acquire direct of indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank ...

The definition of "control" is defined at Section 2(a)(2) of the BHC Act, 12 U.S.C. § 1841(a)(2), as follows:

> Any company has control over a bank or over any company if--

(A) the company directly of indirectly or acting through[26] one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

Section 11(a) of the Board's Regulation Y implements this statutory provision by requiring a prior application to the Board for the formation of a bank holding company. 12 CFR § 225.11(a).

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[26] FOOTNOTE OMITTED

In the fourth paragraph, ICIC Overseas agrees to finance the purchase of the shares of Independence that it owns beneficially, not only as to interest on loans and so forth, but against any claim on Pharaon, which would include principal. The fifth paragraph allows ICIC Overseas to control the custody of the certificates evidencing ownership of these shares. The sixth paragraph entitles ICIC Overseas to any dividends received on these shares, another indicia of BCCI's ownership. The seventh paragraph gives ICIC Overseas an entitlement to purchase any rights shares that may be offered. Each of these rights is an indicia of ownership.

Pharaon refers to a short phrase in the third paragraph of the Acquisition Agreement as supporting his argument that the agreement is no more than an option. That provision reads:

> For the balance of 85% of the said shares of [Independence] Bank, ICIC [Overseas] shall have the right to purchase them at their cost price from either [Pharaon] in its own name or in the name or names of its nominee or nominees. . . . "

According to the only signer of the Acquisition Agreement to testify, Naqvi, this language simply provided a mechanism for changing the registered owner of the shares from Pharaon to ICIC Overseas or another designee when BCCI felt it appropriate to do so.

An economic analysis of the Acquisition Agreement demonstrates that the parties could not have intended to grant ICIC Overseas an option on Independence shares as opposed to a beneficiary status under Pharaon's fiduciary status. Because of the non-recourse nature of the financing of Independence Bank's shares, Pharaon would suffer no loss if the price of the shares declined in value.

causing BCCI to obtain the power to control the affairs of Independence by naming a majority of the Board of Directors. This violation continued through September 13, 1991, when Enforcement Counsel filed its notice of assessment of civil money penalties.

D. **Violations of Section 5(c) of the BHC Act**

Section 5(c) of the BHC Act, 12 U.S.C. § 1844(c), provides in pertinent party that "[t]he Board from time to time may require reports under oath to keep it informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; . . ." Under Section 225.5(b) of its Regulation Y, Part 225 of 12 Code of Federal Regulations, every bank holding company must annually file a report of its operations for the year. This requirement applies to foreign banks operating branches or agencies within the United States, as well as those companies that control banks within the United States. Section 225.2(c)(2) of Regulation Y, 12 C.F.R. § 225.2(c)(2).

BCCI Holdings, as an entity controlling a foreign bank operating agencies in the United States, filed the reports, known as FR Y-7 from the form designation, required under Regulation Y. In these reports, BCCI indicated that it had no ownership interests in banks in the United States. Because BCCI secretly controlled Independence Bank, this information was false. BCCI thus violated Section 5(c) of the BHC Act. Pharaon willfully aided in BCCI's violation by sending his own reports to the Federal Reserve, as well as by filing an application with the California State Banking Department and a notice with the FDIC, all falsely indicating that he was the sole owner of Independence Bank.

transactions, including the NBG acquisition, the BCCI stock acquisition, and the Attock Oil and the Tradigrain acquisitions as well as the Independence acquisition. Naqvi's testimony in effect was that Pharaon participated in the Independent Bank transaction because of the investment opportunities and "other benefits" previously provided him and expected to be provided to him in the future by BCCI, and not merely the opportunity to acquire 15 percent of Independence Bank.[61] Based on this revised information, Enforcement Counsel seeks additional civil money penalties from Pharaon to disgorge his "ill-gotten gains." The

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[61] FOOTNOTE OMITTED

penalty of slightly over $151 million, while the cap on such computation remains at the maximum penalty, here at most just over $111 million.

The mitigation proviso of the statute permits the application of some judgmental rationality. The undersigned recommends that the civil money penalty assessed against Pharaon be limited to less than the maximum of $111 million, but should be not less than the one-third thereof, to wit, $37 million, the amount sought in the original Notice. The undersigned recommends this amount in spite of the egregiousness of Pharaon's wilful, knowing, continuing violations engaged in with absolute disregard for accuracy of reports or for any consideration of the requirements of law. This recommended assessment of $37 million includes only consideration of the misconduct involving the bifurcated issue presented at this hearing. This is a very meaningful figure, in line with the gravity of the offenses, the intentional nature of the actions, the attempts to conceal the nature of the transactions, the expected levels of profit and the realities of loss. The amount, however, takes into account that insofar as the transactions with Independence are concerned, Pharaon did not enjoy any material financial or other benefit. Further, the collection of this sum is clearly within Pharaon's means and its collection in toto or in greater part is presumably secured by the predecisional attachment. That the Respondent has deep pockets and might well be able to afford a greater amount is not of itself grounds for increase.

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of	)	Docket Nos.
	)	91-037-E-I1
GHAITH R. PHARAON	)	
	)	
Institution-Affiliated Parties of BCCI Holdings (Luxembourg), S.A., Luxembourg, and the Bank of Credit and Commerce International S.A. (Luxembourg)	)	
+++++==========	)	
In the Matter of	)	
	)	
GHAITH R. PHARAON	)	91-043-E-I7

SECOND ADDENDUM TO
RECOMMENDED DECISION
(Issued May 3, 1996)

PLEASE NOTE the following additional corrections to the Judge's Recommended Decision issued April 12, 1996:
p. 43, footnote 14 - the first sentence of this footnote contains the year 1995 which should instead read **1986**.
p. 58, paragraph 105, approximately 6th sentence starting "total payments to Pharaon..." - the figure should be **$118,315,250.40** and not $53 million.

The undersigned appreciates Board Enforcement Counsels' assistance in correcting errors. However, any such future corrections should be sent to the Board directly, the reviewing court in this matter, to ensure that the record

is complete and accurate prior to the issuance of a Final Decision.

SO ORDERED.

Walter J. Alprin
Administrative Law Judge

75. On March 31, 1986, the Second interest payment on the Bank of Boston loan came due. Chan, at Independence, transmitted a reminder to Lodhi in New York about the payment. TR at 2,070 (Chan). At Naqvi's directions from BCCI, TR at 657-66, Imam at BCCI originated anther loan in the name of Pharaon by again issuing instructions to debit account 0100-4498. TR at 2,561-62 (Imam); BoG Ex. 432. He directed that the loan proceeds be paid to the Bank of Boston, and BCCI personnel executed Imam's instructions. TR at 659 (Naqvi), 2,561-62 (Imam); BoG Ex. 390 at 2,135.[14]

76. The third and, as subsequent events would dictate, final interest payment to the Bank of Boston came due on June 30, 1986. Again, Chan reminded Lodhi, at BCCI in New York, to make the payment. TR at 2,073-74 (Chan). Chan also sent a reminder directly to Imam at BCCI in London. TR at 2,569 (Imam). Once again, on Naqvi's direction Imam created a non-recourse loan in the name of Pharaon and disbursed the proceeds to the Bank of Boston. TR at 664-65 (Naqvi), 2,570-71 (Imam); BoG Ex. 495. Again, the debit entry appears in the statement for account number 0100-4498, the same account utilized for the other interest payments and the escrow deposit, and again, Imam sent a telex to the Bank of Boston confirming that the interest payment had been made. TR at 665 (Naqvi), 2,571, 2,574 (Imam, BoG Ex. 390 at 2,136, BOG Ex. 470.

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[14] The statement of account 0100-4498 shows a debit entry of $318,615 in May of 1986. Because the debit instruction from Imam to BCCI Overseas contained no account information, the proper account debit entry was not made until May of 1986. TR at 661 (Naqvi). The difference of $15 between the interest payment due and the debit entry represents the cost of telex charges. TR at 659-660 (Naqvi).

already received in December of 1985, so that Pharaon received appreciably more than the outside consultant had predicted. TR at 767-69 (Naqvi).

105. Imam, Pharaon's account officer, kept a detailed accounting of how these sale proceeds were allocated. TR at 779-86 (Naqvi), 2,637-40 (Imam); BoG Ex. 489. This record, dated in December of 1986, shows $95 million for BCCI shares and $102.5 million for NBG shares, a total of $197.5, due to Pharaon. TR at 780-81 (Naqvi), 2,638-39 (Imam); BoG Ex. 489. Starting from this balance, the record shows two cash payments on Pharaon's behalf occurring in December, 1985, after the Independence Bank sale closed, totalling $65 million. BCCI transmitted these monies to First Chicago Bank. TR at 2,639 (Imam). Imam's accounting also shows that BCCI forgave personal obligations that Pharaon incurred totalling $53 million. Total payments to Pharaon at this point were $118,315,250.40. TR at 2,540 (Imam); BoG Ex. 489. The second page of Imam's accounting shows a $30 million cash payment on April 12, 1986, a $31 million cash payment on May 6, 1986, again to First Chicago, TR at 2,649-50 (Imam), and several minor disbursements to Pharaon, leaving a total remaining balance due Pharaon of slightly more than $14 million. BoG Ex. 498.

106. Imam's accounting is fully consistent with a similar accounting prepared in April, 1986 by Farouk Zavahir ("Zavahir"), who managed Pharaon's personal and business finances. TR 251, 896-97 (Naqvi), 1,435-36 (Lodhi) 3,22-23, 2,646 (Imam); BoG Ex. 598. Zavahir's record shows a total due Pharaon of 175 million, consisting of $80 million and $95 million. BoG Ex. 598. As noted above, Pharaon received $95 million for his BCCI Holdings shares.

United States Court of Appeals
For the District of Columbia Circuit

No. 97-1114 **September Term, 1997**

Ghaith R. Pharaon,
Petitioner,

v.

Board of Governors of the Federal Reserve System,
Respondent.

BEFORE: Ginsburg, Henderson and Tatel, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed March 27, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 97-1114 **September Term, 1997**

Ghaith R. Pharaon,
Petitioner,

v.

Board of Governors of the Federal Reserve System,
Respondent.

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Garland did not participate in this matter.

Civil Money Penalties Assessed by the Board of Governors of the Federal Reserve System January 1990 through December 1994

[Source: Board of Governors of the Federal Reserve System, Staff Reports to Congress Pursuant to Section 918 of FIRREA Covering January 1990 to December, 1994]

Individual/Entity	Year	Assessed Amount
BCCI	1992	200,000,000
Khalid bin Mahfouz/Haroon Kahlon	1993	35,000,000
Kemal Shoaib	1992	20,000,000
Kamal Adham	1992	10,000,000
American Express Bank Int'l	1993	950,000
Daniel M. Burke (2 orders)	1990	600,000
M. Joseph Burke (2 orders)	1990	600,000
John A. Edmiston (2 orders)	1990	600,000
Don C. Davis	1990	600,000
Victor J. Vargas Irausquin	1993	525,000
United Mizrahi Bank, Ltd.	1993	400,000
Sayed Jawhary	1993	270,000
Habib Bank AG Zurich	1992	200,000
National Bank of Pakistan	1992	200,000
Farmers & Merchants Bank	1992	100,000
Donald Horton	1994	100,000

Individual/Entity	Year	Assessed Amount
Michael Jacobs	1994	100,000
Bank Melli Iran	1994	60,000
Bank of New York	1992	50,000
Bank of Seoul	1992	50,000
Central Bank of the South	1992	50,000
Central Fidelity Bank	1992	50,000
Security Pacific Corporation	1992	50,000
First Pacific Bancorp, Inc.	1993	50,000
V. Edgar Stanley	1990	25,000
John Dean	1991	25,000
Glenwood State Bank	1991	25,000
Crestar Bank	1992	25,000
Trust Company Bank	1992	25,000
Dennis Zaun	1992	20,000
Guardian Bank	1993	20,000
Bosshard Banco, Ltd.	1993	16,500
David DeHart	1990	15,000
Robert Marcuccilli	1990	15,000
Wayne Roe	1990	15,000
Judith A. Stanley	1990	15,000
Paul Hufnagle	1992	15,000

Individual/Entity	Year	Assessed Amount
Kenneth G. Walker	1993	15,000
Charles W. Hagan, Jr.	1993	15,000
Leonard Sands	1993	12,500
James R. Sperry	1990	10,000
Rudell Oppegard	1991	10,000
Lynell Skarda	1992	10,000
Langdon Skarda	1992	10,000
Thomas Sexton	1992	10,000
CBC, Inc.	1992	10,000
Greater Ohio River Company	1992	10,000
Pacific Wester Bank	1994	10,000
Randolph Miles	1993	9,000
Community National Bancorp	1991	7,500
Sentry Bancorp, Inc.	1993	7,500
Peoples Bancshares, Inc.	1994	7,500
Sherwin Willens	1990	5,000
Lyle R. Lake	1990	5,000
Provident Bancorp of Texas, Inc.	1990	5,000
Ken Carruthers	1992	5,000
Janice France	1992	5,000
Richard Palmer	1992	5,000

Individual/Entity	Year	Assessed Amount
Sam Scott	1992	5,000
Dellinger & Company	1992	5,000
Sanquist Corporation	1992	5,000
Vic Sather & Associates, Inc.	1992	5,000
Arthur T. Ciccarello	1993	5,000
Dan S. Geiger	1993	5,000
San Ditta	1993	5,000
J.D. Gardner	1993	5,000
John Ray Harrison	1993	5,000
Fred Hornberger	1993	5,000
E.D. Vickery	1993	5,000
Scott A. Noyes	1994	5,000
Kirk Sandquist	1992	4,000
Jose Anotado	1993	4,000
Founders' Bank	1994	4,000
John L. Piesik	1994	3,000
C.M. Newton, Jr.	1990	2,500
C.M. Newton, III	1990	2,500
Michael Vlahos	1991	2,500
Leslie Peters	1991	2,500
Greater Chicago Financial Corp.	1992	2,500

Individual/Entity	Year	Assessed Amount
Jerry Grady	1990	2,000
Jerry Sisinger	1990	2,000
Edwin Nutt	1992	2,000
Marshall County Bankshares, Inc.	1992	2,000
Donald Stuwe	1993	2,000
Cynthia Stout	1993	1,000
Robert J. Ziton	1993	1,000
Jeff Gray	1993	1,000
William H. Kandt	1993	1,000
Earl E. Echols	1994	1,000
Thomas E. Echols	1994	1,000
Joe R. Clark, III	1993	750
Frank LeMaster	1993	750

Civil Money Penalties Assessed by the Board of Governors of the Federal Reserve System January 1995 through June 1998

[Source: Board of Governors of the Federal Reserve System, Staff Reports to Congress Pursuant to Section 918 of FIRREA Covering January 1, 1995 to June 30, 1998]

Individual/Entity	Year	Assessment
Ghaith R. Pharaon	1997	$37,000,000
International Commercial Bank of China	1997	$22,320,000
Asahi Bank, Ltd.	1997	$ 5,000,000
Swiss Bank Corp.	1996	$ 3,500,000
Skandinaviska Enskilda Bank	1997	$ 2,500,000
Interamericas Invs., Ltd.	1996	$ 1,000,000
Postipankki Ltd.	1997	$ 900,000
W.C. Long, Jr.	1996	$ 717,941
DLG Financial Corp.	1995	$ 600,000
John Averett	1997	$ 100,000
Banque Worms, S.A.	1996	$ 100,000
Gary S. Missner	1996	$ 100,000
Michael Riddle	1997	$ 100,000
Oliver Lu	1997	$ 50,000
Mitchell A. Vasquez	1996	$ 50,000
John E. Colley	1998	$ 40,000

Individual/Entity	Year	Assessment
Howard Miller	1996	$ 40,000
Thomas P. Rogers	1996	$ 35,000
Mark Schindler	1997	$ 25,000
Mark Yale	1997	$ 25,000
Constantinos I. Costalas	1995	$ 25,000
Park Jones	1997	$ 20,000
Stuart G. Urban	1995	$ 15,000
Roberto A.F. Roberts	1997	$ 15,000
Habib Bank AG Zurich	1998	$ 15,000
Dane D. Britton	1995	$ 10,000
John C. Kirkpatrick	1995	$ 10,000
Scott Noyes	1996	$ 10,000
Peter Ulrich	1996	$ 10,000
William B. Black, III	1996	$ 9,500
Grace Koo	1997	$ 9,000
G.A. Poling	1998	$ 5,000
Toshihiko Araki	1997	$ 5,000
Barry Winter	1996	$ 5,000
James L. Long	1995	$ 5,000
Leslie R. Cohen	1995	$ 2,500
A.G. Cummings	1995	$ 2,500
John Gillogly	1997	$ 2,000

Individual/Entity	Year	Assessment
Keith Leonard	1996	$ 2,000
Robert Armbruster	1995	$ 2,000
Byung Ho Chang	1995	$ 2,000
T. Stuart Ducote	1997	$ 1,500
Steven J. Hirsch	1995	$ 1,500

Supreme Court, U.S.
FILED
SEP 18 1998
OFFICE OF THE CLERK

No. 98-103

In the Supreme Court of the United States

OCTOBER TERM, 1997

GHAITH R. PHARAON, PETITIONER

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the civil penalty imposed upon petitioner violates the Excessive Fines Clause.

2. Whether the civil penalty imposed upon petitioner violates the Due Process Clause.

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12 U.S.C. 1841(a)(2) 2
12 U.S.C. 1842(a)(1) 2
12 U.S.C. 1844(c) 2
12 U.S.C. 1841(b)(1) 2, 11
12 U.S.C. 1847(b)(1) (1988) 2, 11
12 U.S.C. 1847(b)(2) 2
12 U.S.C. 3106(a) 2
18 U.S.C. 1818(i)(2)(G) 2, 5, 7
12 C.F.R.:
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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-103

GHAITH R. PHARAON, PETITIONER

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 135 F.3d 148. The final decision of the Board of Governors of the Federal Reserve System (Pet. App. 20-55) is reported at 83 Fed. Res. Bull. 347.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998. A petition for rehearing was denied on April 17, 1998. Pet. App. 209. A petition for a writ of certiorari was filed on July 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bank Holding Company (BHC) Act of 1956 makes it unlawful for a company to become a bank

holding company except with the prior approval of the Board of Governors of the Federal Reserve System (Board). 12 U.S.C. 1842(a)(1). A company is a bank holding company if it has control over any bank through direct or indirect control of 25% or more of the bank's voting shares. 12 U.S.C. 1841(a)(1) and (2). Bank holding companies are required to file with the Board annual reports of their operations. 12 U.S.C. 1844(c), 3106(a); 12 C.F.R. 225.5(b), 225.2(c).

The Board may assess a civil money penalty against any "company which violates, and any individual who participates in a violation of," the BHC Act in an amount of "not more than $25,000 for each day during which such violation continues." 12 U.S.C. 1847(b)(1). For conduct prior to August 1989, the maximum was $1000 per day. 12 U.S.C. 1847(b)(1)(1988). In determining the amount of any penalty imposed, the Board is required to take into account:

> (i) the size of financial resources and good faith of the * * * person charged;
>
> (ii) the gravity of the violation;
>
> (iii) the history of previous violations; and
>
> (iv) such other matters as justice may require.

12 U.S.C. 1818(i)(2)(G); see 12 U.S.C. 1847(b)(2).

2. In the early 1980s, the Bank of Credit and Commerce International (BCCI), a commercial bank incorporated in Luxembourg, had operations in nearly 70 countries. Pet. App. 61. BCCI did not control a full service bank in this country. *Ibid.* When BCCI decided to acquire a bank in this country, it had enormous undisclosed losses. *Id.* at 64. BCCI knew that the Board would not approve its acquisition of a U.S. bank

if it discovered its precarious financial condition. *Id.* at 73. In order to conceal its role in the acquisition, BCCI decided to have a nominee acquire a U.S. bank on its behalf. *Ibid.*

BCCI identified Independence Bank in Encino, California, as a desirable acquisition target, and chose petitioner, a wealthy Saudi Arabian businessman, as its nominee in the acquisition. Pet. App. 73. Petitioner had served as BCCI's nominee in undisclosed acquisitions of other companies and had received profits of more than $150 million in dealings with BCCI as compensation for serving as a nominee. *Id.* at 73-74. Petitioner and BCCI entered into a written agreement under which petitioner would become the registered owner of 100% of Independence Bank's shares. *Id.* at 81. Under the agreement, however, petitioner would in fact be the beneficial owner of only 15% of those shares; the remaining 85% of the shares would be held for BCCI. *Ibid.* BCCI also provided petitioner with the $23 million needed to finance the purchase of the shares of Independence Bank in the form of "non-recourse loans" that petitioner was not required to repay. *Id.* at 89-90.

Petitioner applied to the FDIC and the California bank regulators for approval to acquire Independence Bank. Pet. App. 85. In his submissions to regulators, petitioner falsely represented that he was buying 100% of Independence Bank's shares in his own capacity and that he was investing his own funds to make the purchase. *Id.* at 86-87. Petitioner also failed to disclose his agreement with BCCI to hold shares on its behalf. *Id.* at 87. Based on the records before them, the FDIC and the California regulators approved the acquisition. *Id.* at 89.

After the acquisition, BCCI installed its own employee as the senior officer of Independence Bank, selected the majority of the bank's board of directors, and controlled its strategic policy. Pet. App. 113-115, 119-122, 132. BCCI also provided $17.5 million in additional capital to Independence Bank. *Id.* at 117-118. Between 1986 and 1990, BCCI submitted annual reports to the Board in which it was required to disclose the names of any banks in which it controlled more than 5% of the voting shares. *Id.* at 129-130. In each of those reports, BCCI failed to disclose that it controlled Independence Bank. *Id.* at 130. Petitioner knew of those reports. *Ibid.*

In July 1991, after years of extraordinary losses and pervasive fraud, BCCI was closed by regulators throughout the world. Pet. App. 126. In January 1992, Independence Bank was declared insolvent and closed by California regulators. *Ibid.*

3. In 1991, the Board began administrative enforcement proceedings against petitioner, charging him with participating in BCCI's continuing violations of the BHC Act's prior approval requirement and in BCCI's filing of false reports with the Board. Pet. App. 58-59. The Board sought to subject petitioner to a $37 million civil money penalty. *Id.* at 59. Petitioner was subsequently indicted by a federal grand jury in the District of Columbia for his role in the purchase of Independence. *Id.* at 4. He was also indicted by a federal grand jury in Florida and a state grand jury in New York for his participation in other BCCI-related transactions. Petitioner did not respond to the criminal charges. From his home in Saudi Arabia, and acting through counsel, however, petitioner sought a hearing on the Board's charges. *Ibid.*

Following a hearing at which petitioner appeared only through counsel, an Administrative Law Judge (ALJ) issued a decision finding that petitioner had committed all the violations charged and recommending that the Board impose a $37 million civil money penalty. Pet. App. 56-189. In determining the amount of the recommended penalty, the ALJ first calculated the maximum civil money penalty assessable under the BHC Act for petitioner's violations as $111,595,000. *Id.* at 163. The ALJ then considered other factors, including those specifically identified by 12 U.S.C. 1818(i)(2)(G). *Id.* at 164-176. The ALJ found that petitioner's net worth is "almost half-a-billion dollars," *id.* at 168, that petitioner knew that he was violating the banking laws, *id.* at 169, that petitioner's violations were "especially grave" since regulators "were reassured by [his] extraordinary personal wealth," *id.* at 170, and that petitioner violated a "series of laws" and made "multiple false statements" in connection with the acquisition of Independence, *id.* at 174. The ALJ also found that, as a result of the conduct of BCCI and petitioner, "BCCI suffered more than $40 million in losses," and "Independence Bank eventually failed." *Id.* at 187. The ALJ therefore concluded that a $37 million penalty was "in line with the gravity of the offenses, the intentional nature of the actions, the attempts to conceal the nature of the transactions, the expected levels of profit and the realities of loss." *Id.* at 184.

The Board adopted the ALJ's recommended decision. Pet. App. 20-52. The Board explicitly concurred in the ALJ's findings and reasoning with respect to the amount of the civil money penalty. *Id.* at 35.

4. The court of appeals affirmed the Board's orders. Pet. App. 1-19. The court of appeals held that, because the Board had weighed the factors set forth in the BHC

Act and had found that petitioner's fine was in line with the gravity of the offenses, the intentional nature of the actions, and the attempts to conceal the nature of the transactions, there was "nothing arbitrary or capricious in the Board's selection of the penalty." *Id.* at 15. The court also noted that the maximum civil money penalty authorized by the Act was more than three times the amount actually assessed. *Ibid.*

The court of appeals also held that the penalty imposed on petitioner did not violate the Excessive Fines Clause of the Eighth Amendment. Pet. App. 15-16. The court concluded that the Excessive Fines Clause requires a court to consider "the value of the fine in relation to the offense." *Id.* at 15. Reviewing that issue de novo, the court held that there was no Eighth Amendment violation. *Id.* at 16. Relying on the same considerations that led it to conclude that the penalty was not arbitrary or capricious for purposes of review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the court held that "the penalty is proportional to [petitioner's] violation." *Ibid.*

The court of appeals also held that the penalty was not imposed in violation of the notice component of the Due Process Clause. Pet. App. 16. The court explained that petitioner "cannot claim that he lacked constitutionally adequate notice" when the assessed penalty falls far below the statutory maximum. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-16) that the holding below that the fine imposed on petitioner does not violate the Excessive Fines Clause conflicts with *United States* v. *Bajakajian*, 118 S. Ct. 2028 (1998). That contention is without merit and does not warrant review.

In *Bajakajian*, the Court held that the Excessive Fines Clause is violated if a fine "is grossly disproportional to the gravity of a defendant's offense." 118 S. Ct. at 2036. The Court rejected a principle of "strict proportionality," reasoning that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 2037. The Court also held that, while factual findings of a lower court must be accepted unless clearly erroneous, an appellate court must review the issue of proportionality de novo. *Id.* at 2037 & n.10.

The decision below is fully consistent with *Bajakajian*. In particular, the court in this case held that the Excessive Fines Clause requires a court to consider "the value of the fine in relation to the offense." Pet. App. 15. The court of appeals then examined that issue de novo, and concluded that the penalty imposed on petitioner was "proportional to his violation." *Id.* at 16.

Petitioner's principal contention (Pet. 12) is that the decision below conflicts with *Bajakajian* because the court offered no rationale for its conclusion that the penalty imposed on petitioner was proportional other than that the penalty was below the statutory maximum. That contention, however, is based on a misreading of the court's decision. In finding that the penalty imposed on petitioner is proportional to his offense, the court below expressly relied on the Board's findings under the factors set forth in 12 U.S.C. 1818(i)(2)(G), not on the relationship of the fine to the statutory maximum. Pet. App. 15-16. The court specifically explained that, "[a]fter weighing the mitigating factors set forth in 12 U.S.C. § 1818(i)(G)(i)-(iv)—'(i) the size of financial resources and good faith of

the . . . person charged; (ii) the gravity of the violation; (iii) the history of previous violations; and (iv) such other matters as justice may require—the Board found the penalty 'in line with the gravity of the offenses, the intentional nature of the actions, [and] the attempts to conceal the nature of the transactions.'" *Id.* at 15. The court noted that the penalty was well below the statutory maximum only after it had already concluded, based on the Board's findings, that the penalty was proportional. *Id.* at 16 ("As we have already indicated in rejecting [petitioner's] APA challenge, the penalty is proportional to his violation and well below the statutory maximum.").

Petitioner contends (Pet. 15) that the conduct at issue in this case is comparable to the reporting violation at issue in *Bajakajian*, and that the substantial penalty imposed on him is therefore grossly disproportional to his offense. Petitioner's conduct, however, is not remotely comparable to the conduct at issue in *Bajakajian*.

Bajakajian was convicted of willfully failing to report the otherwise legal removal of currency from the United States on a single occasion, and was subject to a forfeiture of the entire $357,144 that he had failed to report. The "violation was unrelated to any other illegal activities. The money was the proceeds of legal activity and was to be used to repay a lawful debt." *Bajakajian*, 118 S. Ct. at 2038. Bajakajian was not a money launderer, drug trafficker, or tax evader, and therefore did not "fit into the class of persons for whom the statute was principally designed." *Ibid.* The harm caused by Bajakajian's conduct was also "minimal." *Id.* at 2039. It "affected only one party, the Government," and, since there was no fraud or revenue loss, the

impact on the United States was "relatively minor." *Ibid.*

The situation here is entirely different. Petitioner helped to conceal major and continuing substantive violations of the banking laws. Had petitioner been truthful, the government would have learned of BCCI's illegal control of Independence Bank long before it did and could have acted to prevent its collapse. Pet. App. 132. Instead, Independence, a federally insured bank, became insolvent and was closed, requiring the government to repay investors and to seek recoupment from BCCI. *Id.* at 126.[1] In addition, BCCI's $40.5 milion investment in Independence Bank became worthless when Independence Bank failed, subjecting BCCI and its world-wide depositors to a substantial risk of serious losses. *Id.* at 187.[2] Finally, petitioner expected to

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[1] Independence Bank had more than $575 million in assets and was the largest state-chartered bank in California to fail. 1992 FDIC Ann. Rep. 39. The FDIC paid more than $525 million to insured depositors of the Bank at an estimated cost to the FDIC of approximately $164 million. *Id.* at 173-174. As a result of a subsequent criminal forfeiture action against BCCI, the United States was able to recoup the cost of paying the insured depositors of Independence Bank. *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995). At the time of the Bank's closing, however, there was no assurance that any of the FDIC's costs could be recovered.

[2] Contrary to petitioner's contention (Pet. 8), the amendment to the court of appeals' opinion deleting the reference to BCCI's unrecoverable investment in Independence Bank does not undermine the Board's findings concerning BCCI's potential losses. The court amended its opinion after petitioner filed a petition for rehearing in which he informed the court that he was taking the position in ongoing litigation that BCCI had recovered its investment in Independence Bank. C.A. Reh'g Pet. at 8 & n.6. Regardless of whether BCCI eventually recovered its investment

realize substantial profits from his illegal activity. *Id.* at 74, 184. Before the acquisition of Independence, petitioner had already engaged in transactions with BCCI in which he ultimately earned more than $150 million, and those transactions were intended to be "indicative of future opportunities to be offered to [petitioner] by BCCI." *Id.* at 74. Those circumstances fully support the court's conclusion that the penalty imposed on petitioner is not grossly disproportional in relation to his offense. That is especially true in light of the fact that petitioner has a net worth of a "half-a-billion dollars." *Id.* at 168. In any event, the court of appeals' fact-bound proportionality determination does not warrant review.

2. Petitioner's contention (Pet. 16-23) that the penalty imposed on him violates the Due Process Clause is equally without merit. Petitioner argues (Pet. 17-18) that the penalty violates the principle of proportionality that is embodied in the Due Process Clause. As this Court held in *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), however, when a particular amendment "provides an explicit textual source of constitutional protection against [a particular sort of] governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." See also *County of Sacramento* v. *Lewis*, 118 S. Ct. 1708, 1714-1715 (1998). Because the Excessive Fines Clause provides

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in Independence Bank, at the time that Independence was closed, BCCI's potential losses were substantial, and that substantial risk of loss was appropriately considered by the Board in imposing its penalty on petitioner. Cf. *TXO Production Corp.* v. *Alliance Resources Corp*, 509 U.S. 443, 460 (1993) (plurality opinion) (in assessing punitive damages, "[i]t is appropriate to consider the magnitude of the *potential harm*") (emphasis in original).

an explicit textual source of protection against excessive civil penalties, a due process inquiry into whether such a penalty is excessive is inappropriate.

BMW of North America, Inc. v. *Gore*, 517 U.S. 559 (1996), relied on by petitioner, does not suggest otherwise. That case involved the question of the extent to which the Due Process Clause imposes limits on the imposition of excessive punitive damages awards in a civil case between private parties. Because the Excessive Fines Clause does not apply to such awards, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), a due process proportionality inquiry was not precluded under *Graham*.

Nor does the imposition of the award in this case violate the due process principle that a person must receive adequate notice "of the severity of the penalty that a [government] may impose." *BMW*, 517 U.S. at 574. Here, during the period from 1985 through 1991 when petitioner engaged in the violations at issue, the text of the BHC Act placed him on notice that he could be subject to a civil penalty of up to $1000 per day before August 1989, 12 U.S.C. 1847(b)(1)(1988), and up to $25,000 for each day a violation continued thereafter, 12 U.S.C. 1847(b)(1). As the court of appeals explained, because petitioner's "assessed penalty falls far below the statutory maximum, [petitioner] cannot claim that he lacked constitutionally adequate notice." Pet. App. 16.

Petitioner errs in suggesting (Pet. 18) that notice may be supplied only by the penalties actually imposed in comparable cases. Under *BMW*, notice may be furnished by "civil penalties *authorized or* imposed in comparable cases." *BMW*, 517 U.S. at 575 (emphasis added). Because "no two cases are truly identical," *TXO Production Corp.*, 509 U.S. 443, 457 (1993) (plural-

ity opinion), an authorized sanction is "not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998

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[3] Petitioner's reliance on the less severe penalties imposed in *Intramericas Investments, Ltd.* v. *Board of Governors*, 111 F.3d 376, 381 (5th Cir. 1997), and *W.C. Long* v. *Board of Governors*, 117 F.3d 1145, 1150 (10th Cir. 1997), is particularly unpersuasive. The penalties in those cases were assessed years after petitioner engaged in the violations at issue here, and therefore could not have provided notice as to the likely penalties for his conduct. In any event, neither of those cases involved the failure of the bank unlawfully acquired.

No. 98-103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GHAITH R. PHARAON,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. The Government's Brief in Opposition does not dispute that the $37 million penalty levied upon petitioner Pharaon is grossly disproportional to any penalty ever levied upon a non-BCCI individual in a comparable case. It argues simply that "'no two cases are truly identical,'" Opp. Br. at 11 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion)), and that the $37 million penalty "imposed on petitioner is not grossly disproportional in relation to *his* offense." Opp. Br. at 10 (emphasis added). The Government accordingly concludes that no review under the Excessive Fines or Due Process Clauses is warranted.

The Government, however, remains unable to identify the harm to which the $37 million penalty is supposedly proportional. In light of the court of appeals's order deleting from its opinion the sentence "Thirty-seven million dollars reflects the approximate amount the Board found BCCI invested in Independence, as well as approximating the gains sought and the potential harm posed by Pharaon's facilitation of BCCI's secret takeover of a bank worth several hundred million dollars," and the sentence "Indeed, BCCI's unrecoverable investment in the now-defunct Independence represents adequate 'financial loss or other damage' for purposes of the prohibition order," *see* Pet. App. 15, 17, 18-19, the Government cannot and does not argue that $37 million represents any actual harm to BCCI, nor does the Government deny that "BCCI eventually recovered its investment in Independence Bank," Opp. Br. at 9-10 n.2. Likewise, the Government does not argue that the $37 million represents any actual harm to BCCI's United States depositors, nor could it do so in light of the fact that all such depositors were fully paid in the course of BCCI settlement proceedings. *See, e.g., Hamid v. Price Waterhouse & Co.*,

No. CV 91-4483 CMB, 1992 WL 696398, at *1 (C.D. Cal. 1992) (noting that "no BCCI depositors who had money in United States offices on July 5, 1991 will lose their deposits"), *aff'd*, 51 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996).

Instead, the Government now contends that the $37 million corresponds to the "*potential* losses" to which petitioner supposedly subjected BCCI, even if those potential losses were never realized. Opp. Br. at 9-10 n.2 (emphasis added); *see id.* at 9 ("BCCI's $40.5 million investment in Independence Bank became worthless when Independence Bank failed, subjecting BCCI and its world-wide depositors to a substantial *risk* of serious losses" (emphasis added)). The Government's "potential harm" theory should be rejected. To begin with, it is odd to hold Pharaon responsible for potential harm to BCCI -- itself the principal wrongdoer Pharaon allegedly aided and abetted. Moreover, as the Government omits to mention, the court of appeals deleted from its opinion the sole sentence containing any finding that petitioner had caused such "potential harm." Pet. App. 15 & 18.

Even putting these problems aside, the vague concept of "potential harm" has no bearing on the constitutionality of the penalty under the Excessive Fines Clause. In *United States v. Bajakajian*, 118 S. Ct. 2028 (1998), this Court interpreted that Clause to require that the amount of a penalty "bear some relationship to the gravity of the offense that it is designed to punish," *id.* at 2036, not some relationship to all the potential consequences of that offense. Justice Thomas's opinion for the Court in *Bajakajian* inquired solely into actual, not potential injury, concluding in that case that "[t]he harm that respondent *caused* was . . . minimal," *id.* at 2039 (emphasis added), and that the $357,144 forfeiture in

that case "bears no articulable correlation to any injury *suffered* by the Government." *Id.* (emphasis added).

Bajakajian cannot be distinguished from this case on the ground that the reporting requirements under the Bank Holding Company Act are prophylactic, or specifically directed at potential future harm, for the currency transaction reporting requirements at issue in *Bajakajian* are equally prophylactic, and yet this Court in that case declined to find potential harm relevant to a proportionality determination. To the contrary, the Court reasoned it was "impossible to conclude" that "the harm [Bajakajian] caused was "anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs," *id.* -- even though taking $375,144 out of the country obviously subjects the Government to a 30 times greater risk of *potential* loss than taking $12,000 out of the country in the event that any harm later materializes for which the Government seeks a fine or recoupment. The Court correctly ignored potential harm in *Bajakajian*, for consideration of such a factor would eviscerate any meaningful limit on the Government's discretion to set penalties arbitrary in amount.

Finally, the Government now advances for the first time the theory that the $37 million penalty somehow correlates to harm that petitioner supposedly caused to Independence Bank: "Had petitioner been truthful, the government would have learned of BCCI's illegal control of Independence Bank long before it did and could have acted to prevent its collapse. Pet. App. 132. Instead, Independence, a federally insured bank, became insolvent and was closed, requiring the government to repay investors and to seek recoupment from BCCI. *Id.* at 126." Opp. Br. at 9.

With respect, this assertion is wholly speculative and without foundation in the record. To begin with, the Government purposefully litigated this case on a theory of supposed harm to BCCI, which was regulated by the Federal Reserve, and not harm to Independence Bank, which was regulated by the State of California and the Federal Deposit Insurance Corporation, in order to justify the Board's jurisdiction. Even putting this problem aside, there is nothing in the record to suggest that Pharaon's participation in BCCI's reporting omissions -- as opposed to the collapse of the California real estate market or the Government's own seizure of Independence in connection with its proceedings against BCCI -- *caused* the "failure" of Independence Bank. The Government's citation to Pet. App. 126 is unavailing, for there the ALJ simply noted as a factual matter that "Independence Bank became insolvent and was closed by the California Banking Superintendent, and taken over by the Federal Deposit Insurance Corporation as receiver in January of 1992." Neither that nor any other finding below attributes the cause of the Independence Bank failure to the reporting omissions by Pharaon. Indeed, the cause of the Independence Bank failure (or seizure) simply was not an issue litigated or subjected to any fact-finding whatever in the proceedings below.

Even assuming that the Independence Bank closure could be attributed in part to petitioner, it is irrelevant because neither Independence, its depositors, nor the Government suffered any harm from that closure. As the Government concedes, "[a]s a result of a subsequent criminal forfeiture action against BCCI, the United States was able to recoup the cost of paying the insured depositors of Independence Bank." Opp. Br. at 9 n.1 (citing *United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187 (D.C. Cir. 1995)). *See also* 1992 FDIC Ann. Rep. 33 (noting that all depositors of Independence, including those over the insurance limit,

were fully paid because the FDIC would be reimbursed from the BCCI fund). In other words, the $140 to $164 million cost to the Bank Insurance Fund in paying depositors was in fact borne by BCCI, not by the Fund. Thus, once again the Government is forced to rely on a theory of unrealized *potential* harm to Independence and the public fisc: "At the time of the Bank's closing, . . . there was no assurance that any of the FDIC's costs could be recovered." Opp. Br. at 9 n.1. This should be rejected for the same reasons given above for rejecting a theory of *potential* harm to BCCI.

The potential harm theory should also be rejected because, contrary to the Government's *ipse dixit*, there was not even any *potential* harm when Independence was closed. The Government is simply mistaken on this score and it thereby demonstrates the inappropriateness of referring to "facts" that are not part of the record and were never part of the proceedings below. Specifically, Independence Bank was closed on January 30, 1992, less than one week after BCCI's plea agreement was accepted by the Court in *United States v. BCCI Holdings (Luxembourg), S.A.*, No. CR 91-0655 (D.D.C.). BCCI's plea agreement specifically provided that the Bank Insurance Fund would be reimbursed from the approximately $552 million of BCCI assets in the United States. *United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187-88 (D.C. Cir.), *cert. denied*, 515 U.S. 1160 (1995). The Government therefore had every assurance that the Bank Insurance Fund would be reimbursed when the Government closed Independence Bank six days after the plea was accepted. Indeed, it may be naturally inferred that it was upon that very assurance that the FDIC proceeded to close Independence Bank.

Left without any dollar amount of actual or even potential harm to which the $37 million penalty can plausibly be related, the Government suggests that petitioner's

supposed expectation of "substantial profits from his illegal activity," and his supposed "net worth of a 'half-a-billion dollars,'" are additional "circumstances" supporting a finding of proportionality in this case. Opp. Br. at 9-10. But both the ALJ and the Board expressly found that "Pharaon did not enjoy any material financial or other benefit" from his Independence transactions. Pet. App. 184; *see id.* at 35. And petitioner's wealth -- even assuming a then-decade-old declaration of net worth was probative of his wealth at the time the penalty was assessed -- cannot properly be a basis for an initial calculation of the appropriate penalty. The governing statute provides expressly that "the size of financial resources" of a defendant is relevant only as a *mitigating* factor to be applied after a presumptive penalty amount is already determined. 12 U.S.C. § 1818 (i)(2)(G).

In short, the Government has failed to demonstrate that the sum of $37 million is related, much less proportional, to any harm that petitioner's reporting omissions caused to BCCI, Independence, or the United States banking system, or to any other reasoned theory of retribution or deterrence. Accordingly, the question whether that penalty is grossly disproportional in violation of the Excessive Fines or Due Process Clauses warrants this Court's review.

2. The Government purports to distinguish the excessive fine invalidated in *Bajakajian* from the excessive fine in this case on the ground that Bajakajian was somehow less culpable than Pharaon. *See* Opp. Br. at 8 (suggesting that "Bajakajian was not a money launderer, drug trafficker, or tax evader," and that the impact on the United States of his failure to report was "'relatively minor'"). This distinction is unavailing. As Justice Kennedy noted in dissent in *Bajakajian*, Bajakajian was "far from an innocent victim": for example, "he was guilty of repeated lies to Government agents and suborning lies by others," and he "was unable to

give a single truthful explanation of the source" of the $375,144 in cash that he had concealed in his luggage. 118 S. Ct. at 2045 (Kennedy, J., dissenting). The majority did not dispute these facts but simply found them irrelevant to the question whether a forfeiture of $375,144 was sufficiently proportional to the offense of failing to report that sum to the Government.

Contrary to the Government's argument, petitioner's situation is in relevant respects just like Bajakajian's: he has been penalized solely for a failure to report, and the Government has not demonstrated that his failure to report caused the government or any other entity any material harm. A $37 million penalty that is without remote parallel in the Board's settled penalty practice outside the BCCI context is therefore just as unconstitutionally excessive in these circumstances as was a $357,144 forfeiture for a reporting violation that normally carried no more than a $5000 fine. See *Bajakajian*, 118 S. Ct. at 2039.

3. If there is any doubt that a $37 million penalty is grossly disproportional to the nonreporting offenses at issue here, this Court at a minimum should grant the petition, vacate the decision below, and remand to the court of appeals for reconsideration in light of *Bajakajian*. *Bajakajian* intervened after the decision of the court of appeals below, and petitioner's excessive fine claim has never been considered under the standard set forth in that decision.

The Government contends that the court of appeals decision in fact conformed anticipatorily with the Eighth Amendment requirements this Court later set forth in *Bajakajian*, *see* Opp. Br. at 7-8, but this effort to rewrite the decision below is unsuccessful. According to the Government, the court of appeals considered "'the value of the fine in relation to the offense' . . . de novo, and

concluded that the penalty imposed on petitioner was 'proportional to his violation.'" Opp. Br. at 7 (citing Pet. App. at 15, 16).

But the Government omits the factual predicate offered by the appeals court for its finding of proportionality: the relevant sentence in fact reads, "*As we have already indicated in rejecting Pharaon's APA challenge*, the penalty is proportional to his violation . . . ." Pet. App. 16 (emphasis added). The court's rejection of the APA challenge rested in turn principally on the sentence the court of appeals later deleted in its order of April 17, 1998: "Thirty-seven million dollars reflects the approximate amount the Board found BCCI invested in Independence, as well as approximating the gains sought and the potential harm posed by Pharaon's facilitation of BCCI's secret takeover of a bank worth several hundred million dollars." Pet. App. 15; *see id.* at 18. Stripped of that sentence, the court of appeals opinion contains no basis for finding the assessed penalty proportional to Pharaon's violation other than the fact that the penalty was within the statutory maximum. But *Bajakajian* expressly rejected the proposition that a penalty's conformity with a statute can settle the question of its proportionality under the Excessive Fines Clause. *See Bajakajian*, 118 S. Ct. at 2038 n.14.

Accordingly, the decision of the court of appeals, as amended to exclude any factual predicate for the proportionality of the $37 million penalty to the gravity of petitioner's offense, cannot be read to have anticipatorily applied the law set forth in *Bajakajian*. At a minimum, the court of appeals should be required to reconsider the record de novo on remand in light of this Court's decision in *Bajakajian*.

4. The Government argues that petitioner's challenge to his penalty under the Due Process Clause should be disregarded "[b]ecause the Excessive Fines Clause provides an explicit textual source of protection against excessive civil penalties". Opp. Br. at 10-11. Obviously, if petitioner's excessive fine claim is rejected, this argument fails and his due process claim must be considered in the alternative.

The Government's sole answer to petitioner's due process argument on the merits is that petitioner received "adequate notice" because his penalty fell within the statutory maximum. Opp. Br. at 11. This answer ignores the point that the Due Process Clause secures values ranging beyond fair warning to individuals. As Justice Breyer, joined by Justices O'Connor and Souter, wrote in concurrence in *BMW of North America v. Gore*, 517 U.S. 559, 587 (1996): "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." For that reason, it is also irrelevant whether decisions illustrating the gross disproportionality of the Board's treatment of Pharaon preceded or followed the assessment of the penalty against him. *See* Opp. Br. at 12 n.3. A $37 million penalty without remote parallel either before or after is the essence of a departure from the rule of law.

CONCLUSION

For these reasons and the reasons set forth in the Petition for a Writ of Certiorari, the petition should be granted, or, in the alternative, the petition granted and the decision below vacated and remanded to the court of appeals.

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